THE LAWS OF MARRIAGE:

CONTAINING

THE HEBREW LAW, THE ROMAN LAW, THE LAW OF THE NEW TESTAMENT, AND THE CANON LAW OF THE UNIVERSAL CHURCH,

CONCERNING

The Impediments of Marriage

AND

The Dissolution of the Marriage Bond;

DIGESTED AND ARRANGED, WITH NOTES AND SCHOLIA,

BY

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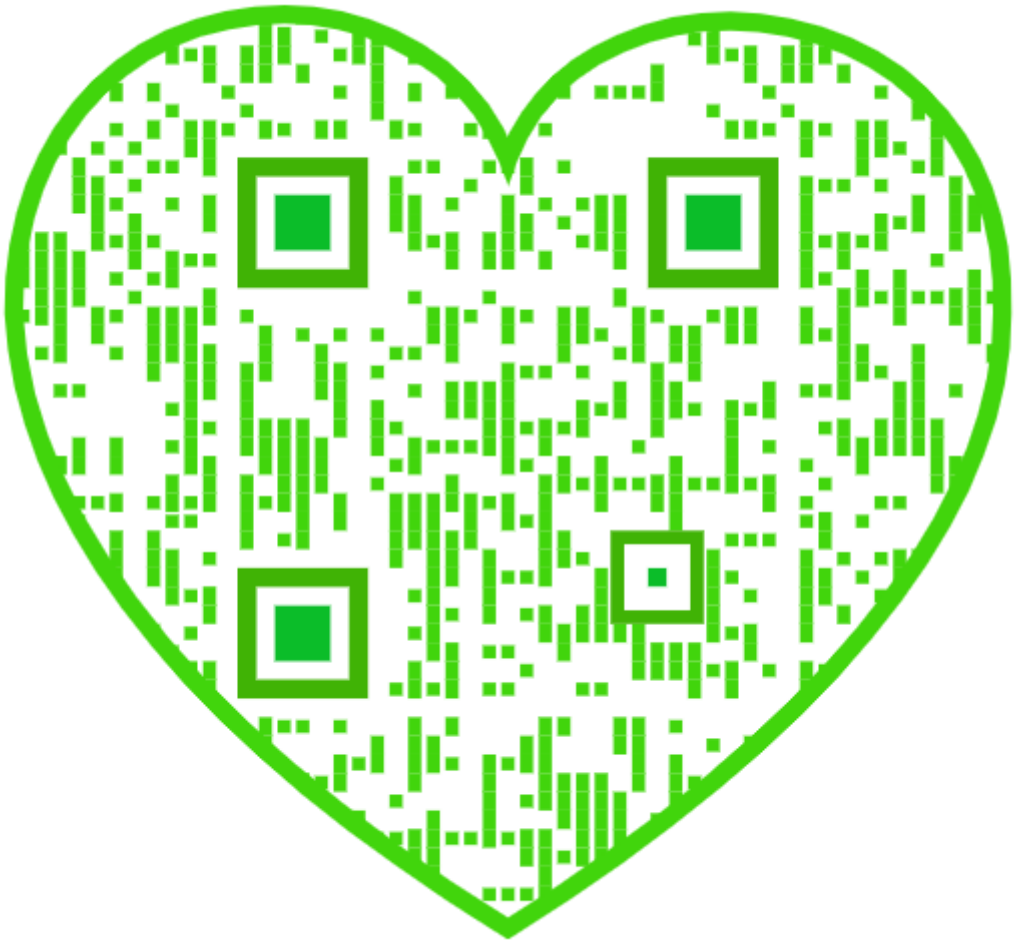

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PREFACE.

The old saw that a book which needs a preface ought not to be printed, does not, I think, apply to this book. I believe that some such book is needed, and that it needs a preface to tell how it came to be neither more nor other than it is, that is to say, an elementary grammar of the laws of Christian marriage.

It has long been evident that the church must legislate upon the subject of marriage; but, thus far, it seems to be doubtful whether we are prepared to legislate wisely, or even intelligently. In my own pastoral experience I have had sad occasion to feel the need of law to guide me in my action as a minister of the church, and the same need has been felt by many men who are very greatly my superiors in learning as in office. Bishops and pastors have from time to time sent me hypothetical or confidential statements of cases occurring in their practical work, with the desire that I should give them such assistance as I could in reaching the solution of their difficulties. Year by year the conviction has grown upon me that the church has no right to leave her clergy uninstructed as they are, in one of the gravest duties of their pastoral responsibility; and that the church itself must legislate, not in the sense of *making* laws concerning marriage, but in the better sense of declaring what the law of God requires.

I frankly confess that, while this conviction has steadily grown upon me, I have yielded to it with the greatest possible reluctance; because in all my studies, I have had occasion to observe the incomparable follies, miseries and iniquities which have attended unprincipled legislation on the subject of marriage; and by unprincipled legislation, I mean

nothing more than legislation founded not on any settled principle, but merely on opinion more or less authoritatively or reasonably sustained. Sometimes, in preparing this book, I have felt as if I were collecting the material for a chapter in Mr. Caxton's still unwritten History of Human Folly; and I have seen that foolish legislation leads to the adoption of false principles, so that the law itself becomes at last the minister of tyranny and all unrighteousness.

With the view of preparing myself for such part as I might be called to take in the church's consideration of this grave and vitally important subject, I resolved, for my own instruction, to collect and compare the Hebrew laws, the ancient civil laws of Rome, the laws of the New Testament, the canons of councils, the decrees of popes, and the judgments of fathers concerning the impediments of marriage, and the dissolution of the marriage bond. In this way I hoped to discover how the law of God has been interpreted by the mind of the church in all ages. After going through many thousands of pages, I found that when I had rejected all that is spurious, doubtful, and irrelevant, the rest might be condensed and arranged within comparatively small compass, and that the law on every particular could be so disposed as to be its own best commentary and suggest its own rational inferences. It was then first that I thought of laying before the church the materials I had collected. My opinions, I knew, were of small importance; but it seemed to me that I might do the church a service if I were to put before it the materials for forming an intelligent judgment upon many matters which are little understood, and some of which are too lightly regarded. Such a service I thought myself qualified to render; and I have ventured to believe that, as my book on the Ancient Canons is now passing to a second edition after ten years of continuous use by learned men in the instruction of their students, without

the discovery of a single error by any other than myself, the church would give me credit, in any similar publication, for scrupulous fidelity and for reasonable accuracy. The work which I thus proposed to myself is now done. By a simple arrangement of the matter, and an equally simple system of cross-references, the reader can have under his eye at any moment every passage of the Holy Scripture, every Roman law, every canon of every council of importance (and of many minor councils), every important papal decree, and every act of the Reformed Church of England bearing upon any point connected with the impediments of marriage, or upon the dissolution of marriage. My own opinions I have neither obtruded nor concealed. My part has been simply to collect and arrange the material and to furnish such necessary prolegomena, explanatory notes, and summary scholia as might facilitate the reader's studies.

I cannot help believing that this book will be of service to the church, because, whatever be its faults of plan or execution, I think it will assist us all to see the principle by which the legislation of the church must be directed and controlled. To my own mind, that principle now seems to be perfectly clear, and it is illustrated equally by all the folly and by all the wisdom of the legislation of the church, provincial, national and patriarchal, on the subject of marriage. If the principle were new I should have little faith in it; but it is not new; it is as old as the church of Christ; it is simply *catholicity*. In nothing have individual churches erred more flagrantly or more perniciously than in their provincial laws of marriage. But, for all that, and in spite of all, there is, in certain things, a catholic consent of all the provinces of christendom, which no church that intends to bear the catholic name may wisely venture to reject. Why may we not apply in ethics, as we do in order and in doctrine, the old test, *si semper*, *si ubique*, *si ab omnibus?* I believe that

Christ's church catholic has never failed in faith, order, or sanctity; and I believe that what the catholic church in every province and in every age has held, practised, and required, is God's truth, God's ordinance, God's will. Never in my life have I been half so strong in that belief as recent studies have compelled me to become; but, on the other hand, I never had so little confidence as now in mere provincial judgments of particular churches touching either faith, order, or morals.

If our own church, which — I say it with sincerest filial love and reverence, — is the youngest, feeblest, and least learned of all catholic churches, should proceed either to make new laws, or to unmake old laws concerning marriage, what right have we to expect to prove ourselves wiser than all that came before us in Jerusalem? I should have no such expectation. I believe that we should legislate as arbitrarily as any church that ever was. But to have no law is to abolish all law, and that is very nearly what our church has done for the first century of its existence. Clearly, it seems to me, we ought to legislate, unless we mean our influence, which is not small in this nation, to be lent to the encouragement of laxity in morals. Let us be content to have our legislation represent the law of God interpreted by catholic consent. Thus, if we should begin, as I believe we ought, by setting forth a table of prohibited degrees of consanguinity and affinity, I know no better table we could make than one that should contain God's own law, given in Leviticus, as it has always been interpreted in every age by every catholic church. If it contained less, it would be because we had renounced catholicity of morals; or, in other words, because we should be heretics in morals, which is quite as bad as heretics in faith. Moreover, we should stand alone in the presumption of our moral heresy. But if our Table of Degrees contained more than catholic interpretation of

God's law requires, we should be making human statutes equal in authority with God's law. The English Table is obnoxious to that criticism, and the consequence has been that some of the degrees prohibited therein have long been tacitly ignored.

On the subject of divorce, the remarriage of divorced parties, and every other I can think of, the same rule will hold as a safe principle of legislation. For I beg the reader to observe that the principle of catholicity will always require a minimum of prohibitions. Only so far as the churches of Christ have manifestly agreed in all ages will this principle allow our church to legislate. Idle, fanciful, eccentric legislation will be necessarily excluded.

I do not deny that with the wisest and most cautious handling of this subject, instances of hardship will occur in the case of persons "to whom the statutes of the Fathers have not been made known by priestly instruction." But the church need not be cruel in such cases. In the third Council of Orleans (see 40 below), and in the wise ruling of the great Gregory (see 45), we shall find a rule that may suffice. The office of a bishop is not to be exclusively concerned with ritual law and doctrinal faith. The church's *Judex Ordinarius* must exercise both judgment and mercy.

I shall be asked, perhaps, why I have not chosen to apply this principle to any of the questions which have been actually raised in connection with the subject, and the answer is, that this book was in no wise meant to promote the adoption of any personal opinions of my own, but simply, as I have said above, to put before the minds of others the same materials for forming a just judgment as I had collected for my own instruction. In the course of this investigation I have more than once seen cause to change my former views of some things, but no change of opinion in myself has led me to change one word or the position of a word

in this book. If I have small respect, and my respect is very small, for provincial opinions as compared with dogmas of the undivided catholic church, I can assure the reader that I have infinitely less respect for any opinions of my own, compared with the deliberate judgment of the church from which I hold my orders. I believe that God will guide our church into all truth and righteousness. My part in this concern will be best done, I think, by furnishing materials for thought, not by attempting to direct it.

For a like reason I have closely confined myself to the single task I had at first proposed. Into the theology of marriage I have entered as little as into its physiology. I have not debated whether matrimony is a sacrament which confers grace, any more than I have discussed the spirituality of sex. Purely legal questions I have not touched; and I have glanced but slightly and incidentally at the ethics of the married state. My only subject is the law relating to impediments of marriage and the dissolution of the marriage bond.

Now that the work is done, and hard work it has been, chiefly to keep the volume down by rigorous and yet faithful condensation, I recognize, and not with great joy, that the highest compliment it can receive will be when some one, after reading it, shall say, "Is that all there is of it?"

JOHN FULTON.

ST. GEORGE'S CHURCH, St. Louis, August 1, 1883.

CONTENTS.

PAGE.

Preface iii
Table of Councils, Popes and Fathers of the Church . . ix
Preliminary Observations iii

PART I.

OF MARRIAGE IN GENERAL.

The Contract of Marriage 11
The Divine Law 12
The Hebrew Law 16
The Roman Law 19

PART II.

OF THE IMPEDIMENTS OF MARRIAGE.

I. Of Impediments in General 24
II. Of Prohibitive Impediments 24
III. Of Dirimant Impediments 26
IV. The Impediment of Consanguinity 29
A. The Hebrew Law 29
B. The Roman Law 31
C. The Law of the New Testament 35
D. Canons, Councils and Judgments of Fathers . . 35
Notes on the Canons, etc. 39
Scholia 44
E. Anglican Reformation 45
V. The Impediment of Affinity 45
A. The Hebrew Law 46
B. The Roman Law 53
C. The Law of the New Testament 54
D. Canons, Decrees and Judgments 55
Notes on the Canons, etc. 63
Scholia 64
E. Anglican Reformation 66
VI. The Impediment of Spiritual Affinity 72
Canons, Decrees, etc. 75
Notes on the Canons 80
Scholium 80
VII. The Impediment of Disparity of Religion . . . 82

PAGE.

A. The Hebrew Law 82
B. The Roman Law 88
C. The Law of the New Testament 88
D. Canons, Decrees, etc. 91
Scholia. 95
Actual Law of the Roman Church 96
VIII. The Impediment of Condition 97
A. The Hebrew Law 97
Scholia. 99
B. The Roman Law 100
C. The Law of the New Testament 102
D. Canons, Decrees, etc. 104
Scholia. 108
E. Anglican Reformation 109
IX. The Impediment of Age 109
A. The Hebrew Law 109
B. The Roman Law 109
C. The Law of the New Testament 110
D. Canons, Decrees, etc. 110
E. Anglican Reformation 113
X. The Impediment of Impotence 113
Physical 113
Mental 115
Canons, Decrees, etc. 115
XI. The Impediment of Precontract. 118
A. The Hebrew Law. 118
B. The Roman Law. 118
C. The Law of the New Testament. 119
D. Canons, Decrees, etc. 121
Scholia. 127
E. Anglican Reformation. 127
XII. The Impediment of Vow. 129
Of Vows in General. 129
Of Vows of Celibacy. 130
A. The Hebrew Law. 131
B. The Roman Law. 134
C. The Law of the New Testament. 135
Scholia. 142
D. Canons, Decrees, etc. 142
Scholia. 152
XIII. The Impediment of Order. 153
C. The Law of the New Testament. 154

PAGE.

Rise and Progress of Clerical Celibacy. . . . 156
D. Canons, Decrees, etc. 158
Scholia. 168
E. Anglican Reformation. 170
XIV. The Impediment of Crime. 172
Canons, Decrees, etc. 172
Scholium. 176
XV. The Impediment of Violence. 178
A. The Hebrew Law. 178
B. The Roman Law. 180
C. The Law of the New Testament. 181
D. Canons, Decrees, etc. 183
E. Anglican Reformation. 185
XVI. The Impediment of Abduction. 186
A and *B.* Hebrew and Roman Law. 186
D. Canons, Decrees. etc. 188
Scholium. 189
E. Anglican Reformation. 190
XVII. The Impediment of Error. 191
Canons, Decrees, etc. 191
XVIII. The Impediment of Clandestinity. 193
Canons, Decrees, etc. 194
Anglican Reformation. 198
XIX. The Impediment of Public Decency. 201
Papal Decrees. 202
Second Marriages. 203
Canons, Decrees, etc. 207
Scholium. 210
XX. Of Indulgences, Dispensations, Etc. 211

PART III.

OF THE DISSOLUTION OF MARRIAGE.

A. The Hebrew Law. 227
Scholium. 230
B. The Roman Law. 233
C. The Law of the New Testament. 236
D. Canons, Decrees, etc. 245
Scholia. 262
E. Anglican Reformation. 268
F. Law of the American Church. 269

LIST OF COUNCILS, POPES AND FATHERS REFERRED TO IN THIS WORK.

The Councils are given as usually referred to in the works of canonists. The modern names of the places where they were held are added, together with their grade as Œcumenical, Provincial, etc., and, generally, the number of bishops present at each.

The names of popes and patriarchs are followed by the dates of their respective pontificates.

Conc. Aenhamense; (Enham, A. D. 1009; English National).

Conc. Agathense; (Agde, A. D. 506; Gallican Provincial; Bps. 35).

Alexander III., Papa; (1159–1181).

Alexius, Constantinopol. Patriarcha; (A. D. 1025–1043; his constitutions are of force among the Easterns).

Conc. Altheimense; (Altheim, A. D. 916; Bavarian National).

S. Ambrosius; (A. D. 333–397.)

Conc. Ancyranum; (Ancyra, A. D. 314; Provincial Council of Galatia; Bps. 18. The canons were afterwards received into the code of the Universal Church).

Conc. Andegavense; (Angers, A. D. 453; Provincial; Bps. 8, assembled for consecration).

Conc. Antisiodorense; (Auxerre, A. D. 578; Provincial).

SS. Apostolorum Canones. The apostolical canons are of great antiquity, probably not later than the second century. The first fifty are universally received, the last fifty by the Easterns only.

SS. Apostolorum Constitutiones. The so-called apostolical constitutions are, unquestionably, of great antiquity, and probably reached their present form not later than early in the fourth century.

Conc. Arausicanum; (Orange, A. D. 441; Provincial; Bps. 15, of the provinces of Lyons and Narbonne.

Conc. Arelatense I.; (Arles, A. D. 314; Western General; Bps. 200; some say 600).

Conc. Arelatense II., (A. D. 452; Provincial).

Conc. Arelatense III.; (A. D. 524; Provincial; Bps. 17).

Conc. Arvernense; (Auvergne, A. D. 533; Provincial; Bps. 15).

Athenagoras; Little is known of the life of Athenagoras. His Apology was addressed to Aurelius and Commodus about A. D. 177.

S. Augustinus; (A. D. 354–430).

Conc. Aurelianense I.; (Orleans, A. D. 511; Provincial; Bps. 32).

Conc. Aurelianense II.; (A. D. 533; Provincial).

Conc. Aurelianense III.; (A.D. 538; Provincial of Lyons; Bps. 19).

Conc. Aurelianense IV.; (A. D. 541; Provincial; Bps. 38; the acts were subscribed in the name of 38 other Bps. not present.

S. Basilius; (A. D. 326–379). His canons, which were written about (A. D. 370) are in the code of the Eastern Church.

Conc. Bituricense; (Bourges, A. D. 1031; Provincial).

Bonifacius VIII., Papa.; (A. D. 1294–1303).

Bonifacius VIII.; Decretals of, commonly called The Sixth Book of the Decretals; (A. D. 1298).

Conc. Cabilonense; (Châlons, A. D. 813).

Conc. Cæsar-Augustanum III.; (Saragossa, A. D. 691).

Conc. Carthaginense III.; (Carthage A. D. 397; Gen-

eral African; Canons afterwards received into the Universal Code).

Conc. Carthaginense IV.; (A. D. 398; General African; Bps. 214; Canons generally received).

Conc. Carthaginense V.; (A. D. 401; General African; Bps. 72; Canons generally received).

Conc. Chalcedonense; (Chalcedon, A. D. 451; Œcumenical; Bps. 630).

S. Clemens Alexandrinus; flourished A. D. 190–220.

Conc. Compendiense; (Compiègne, A. D. 757; National Gallican).

Conc. Confluentinum; (Coblentz, A. D. 922; Presided over by the Archbishop of Cologne).

S. Cyprianus; Bp. 248–258.

Conc. Dingolfindense; (Dingolfind, A. D. 772; National Bavarian).

Conc. Eliberitanum; (Elvira, A. D. 305; Bps. 19).

Conc. Epaonense; (Epaon, perhaps the present Iene, A. D. 517; Bps. 25).

Conc. Forojulianum; (Friuli, A. D. 791; held under Paulinus, Patriarch of Aquileia).

Conc. Gangrense; (Gangra, A. D. 343–381; Provincial of Paphlagonia; canons afterwards received into the Universal Code).

Gelasius, Papa; (A. D. 492–496).

Gratianus; (A. D. 1151).

Gregorins, I., Papa; (A. D. 597–604).

Gregorius II., Papa; (A. D. 715–731).

Gregorius III., Papa; (A. D. 731–741).

Gregorius IX., Papa; (A. D. 1227–1241); Decretals of, A. D. 1230.

Conc. Herfordense; (Hereford, A. D. 673; Provincial of of Canterbury; Bps. 6).

S. Hermas; circ. A. D. 100–150.

S. Hieronymus; (A. D. 340–420).

Hincmar Remens. Archiep. (A. D. 860).

Conc. Hipponense; (Hippo, A. D. 393; Provincial African; its canons were united with those of Carthage III.).

Conc. Hispalense II.; (Seville, A. D. 619).

Hormisdas, Papa; (A. D. 514–523).

Innocentius I., Papa; (A. D. 402–417).

Joannis VIII., Papa; (A. D. 872–882).

Julius II., Papa; (A. D. 682–683).

Conc. Laodicenum.; (Laodicea, A. D. 343–381; Provincial of Phrygia; Bps. 22; Canons received into the Universal Code).

Conc. Lateranum I.; (A. D. 1123; Rome; Western General).

Conc. Lateranum II.; (A. D. 1139; Rome; Western General).

Conc. Lateranum IV.; (A. D. 1215; Rome; Western General).

Conc. Londinense; (London A. D. 605).

Leo I., Papa; (A. D. 440–461).

Leo VII., Papa; (A. D. 936–937).

Conc. Matisconense I.; Mâcon. (A. D. 581; Provincial; Bps. 21).

Conc. Matisconense II.; (A. D. 583; Provincial; Bps. 60).

Conc. Meldense, (Meaux, A. D. 845; Frankish Council under Hincmar Abp. of Rheims, and Rudolph Abp. of Bourges).

Mepham, Simon, Abp. of Canterbury, Constitutions of; (A. D. 1328).

Conc. Metense, (Metz, A. D. 753; National under Pepin).

Conc. Moguntiacum; (Mayence, A. D. 813; National under Charlemagne; Bps. 30, Abbots 25, and Nobles).

Conc. Moguntiacum; (A. D. 847. National).

Conc. Nannetense; (Nantz, A. D. 658?).
Conc. Nemansense; (Nismes; A. D. 1096).
Conc. Neo-Cæsariense; (Neo-Cæsarea, A. D. 314–323; Provincial of Cappadocia; Bps. 17; Canons received into the Universal Code).
Conc. Nicænun; (Nice A. D. 325; Œcumenical; Bps. 318).
Nicolaus I., Papa; (A. D. 858–867).
Otho, Cardinal legate, Constitutions of, (A. D. 1237).
Conc. Parisense II.; (Paris, A. D. 557; Provincial; Bps. 15).
Conc. Parisense V.; (A. D. 615, National Frankish under Clotaire II.).
Paschalis II., Papa; (A. D. 1099–1118).
Conc. Rhemense; (Rheims, A. D. 630; Doubtful).
Conc. Rhemense; (A. D. 1099).
Richard, Abp. of Canterbury, Constitutions of, (A. D. 1222).
Conc. Romanum; (Rome, sub Innocentio I., A. D. 416).
Conc. Romanum; (sub Hilario, A. D. 461).
Conc. Romanum; (sub Gregorio II., A. D. 721).
Conc. Romanum; (snb Zacharia, A. D. 743).
Conc. Romanum; (sub Eugenio II., A. D. 826).
Conc. Romanum; (A. D. 998 or 999).
Conc. Romanum; (sub Nicolao II., A. D. 1059).
Conc. Romanum; (sub Gregorio VII., A. D. 1075).
Conc. Rotomagense; (Rouen, A. D. 1072; Provincial; Bps. 6).
Conc. Saligunstadense; (Seligenstadt, A. D. 1022).
Conc. Salisburgense; (Saltzburg, A. D. 1420).
Simon, Abp. of Canterbury, Provincial Constitutions of; (A. D. 1328).
Siricius, Papa; (A. D. 385–399).
Stephen, Abp. of Canterbury, Constitutions of; (A. D. 1222).

Stratford, John, Abp. of Canterbury, Provincial Constitions of; (A. D. 1342.)

Tertulianus; flourished A. D. 194–206.

Conc. Ticinense (Ticino, A. D. 850; Provincial under the Abp. of Milan.)

Timotheus, Alexandriae Patriarcha; (A. D. 380–385. His canons are received by the Easterns).

Conc. Toletanum I.; (Toledo, A. D. 400; Provincial).

Conc. Toletanum II.; (A. D. 527; Provincial; Bps. 8).

Conc. Toletanum III.; (A. D. 589; National; Bps. 78).

Conc. Toletanum IV.; (A. D. 633; National; Bps. 70).

Conc. Toletanum IX.; (A. D. 655; Provincial; Bps. 16).

Conc. Toletanum XIII.; (A. D. 683; National; Bps. 48).

Conc. Triburiense; (Tribur, A. D. 895; Provincial; Bps. 22).

Conc. Tridentinum; (Trent, A. D. 1563; Roman General).

Conc. Trullanum; (Constantinople, A. D. 691; Eastern General).

Conc. Turonense I.; (Tours, A. D. 461; Provincial; Bps. 8).

Conc. Turonense; (Tours, A. D. 567; Provincial; Bps. 9).

Conc. Turonense; (A. D. 1800; Legatine; Bps. 8).

Conc. Valentinum; (Valence, A. D. 374; Provincial; Bps. 30).

Conc. Vermeriense; (Vermerie, A. D. 753; National; under Pepin).

Conc. Vernense II.; (Verneuil, A. D. 844; Provincial).

Conc. Wormatiense; (Worms., A. D. 868; Provincial).

Walter, Abp. of Canterbury, Constitutions of; (A. D. 1322).

Zacharias, Papa; (A. D. 741–752).

THE LAW OF MARRIAGE.

PRELIMINARY OBSERVATIONS.

§ 1. The Christian church, from its first foundation, held itself to be bound in all things by the laws of the Old Testament, except in those particulars in which the precepts of Christ and his Apostles had explicitly repealed the statutes of the older covenant by the precepts of the new; and hence the Hebrew law of marriage, as contained in the Books of Moses or elsewhere, must be received as a part of the Christian law, with the exceptions named.

§ 2. The church was taught by Christ and his apostles to obey the civil authority in all things which did not include or imply disobedience to the law of God; and hence the laws of Rome concerning marriage challenged the obedience of every Christian. No Christian was at liberty, as a Christian, to disobey any positive requirement of the Roman laws concerning marriage, since none of the positive requirements of the Roman law were inconsistent with any other law which Christians were bound to obey. Hence, the positive parts of the Roman law of marriage must be

considered in connection with the Christian law on the same subject.

§ 3. The permissive parts of the Roman as of the Hebrew law, were largely modified by the enactments of Christ and his apostles. Thus, the law of Moses and the later law of Rome allowed an almost unlimited freedom of divorce which was utterly forbidden to members of the church.

§ 4. After the apostolic age it became necessary for persons charged with the discipline of the church both to declare the divine law of marriage and to impose penance upon such as might have violated its provisions. Single cases occurring in particular churches furnished, after a time, the precedents for general rules or canons which were adopted by the bishops of districts, countries, or provinces.

§ 5. It nowhere appears that the earlier councils of the church, whether local, national, provincial or general, pretended to have any right to make new laws concerning marriage; but only to declare the law of God, as it had already been revealed, and the proper ecclesiastical punishment for offences against it. In the earlier centuries the cases which arose were comparatively simple, and the provincial dispositions of them were, for the most part, consistent with each other.

§ 6. When the Roman Empire had become nominally Christian, the thought of the church concerning marriage was profoundly influenced by the civil law. The church strove to obliterate from the civil law the provisions and permissions of which the church itself for-

bade its members to avail themselves; an attempt which the civilians generally strove to resist; and hence the civil law changed from time to time as the emperors were swayed in the one direction or the other. The influence of the church on the secular law was undoubtedly great and beneficial; but, on the other hand, the church itself was penetrated by ideas which had, no foundation except in the theories and maxims of the civil law. Indeed, there are whole categories of canon law, for the reasons or foundation of which we shall look in vain in the pages of Holy Scripture, or even in the canons of early councils, or in the works of the earlier fathers of the church; but which find their easy explanation in certain fundamental notions of the civil law. A conspicuous instance is the Impediment of Spiritual Affinity, which has no foundation whatsoever in Scripture, reason, or early tradition; but which is an application to things spiritual of the Roman law of Adoption.

§ 7. As the barbarious Gothic, Celtic, and Frankish nations were gathered into Christendom, practical difficulties demanded concessions to the converted peoples such as had been denied to older Christian peoples. Thus Gregory the Great was obliged to apologize to the bishops of Sicily for granting to the converted Saxons an indulgence which the Fourth Lateran Council afterwards declared to be expedient for all Christendom.

§ 8. In all regions public opinion, however formed, exercised its usual influence on the mind of the church, and on ecclesiastical interpretations of the divine law.

Thus, second marriages, which, at the east, were considered to be so disreputable as to require ecclesiastical censure, were hardly censured in the west at all; and many marriages were absolutely prohibited at the west, which were freely allowed in the eastern church.

§ 9. It is to be observed that he who interprets law, makes law; and, with the advance of ages, councils assumed a right of original legislation which had no example in the early age of the church. Thus the exercise of a power to restrain according to God's law grew into a practice of arbitrary legislation which, in these days, is hardly conceivable.

§ 10. It is further to be observed that as compulsory celibacy was imposed upon the clergy of the west, restraints upon the marriage of the laity were correspondingly multiplied. The number of canons requiring the clergy to abstain from marriage, or from the use of marriage, establishes the fact that such canons were seldom obeyed; and a reputation for sanctity was often cheaply obtained by severity in making laws for others who were not of the priestly order.

§ 11. Again, we must observe that every province of the church assumed and held jurisdiction over all Christians dwelling within its boundaries. Hence, the legislation of different provincial councils, assembled in different ages, and influenced by different circumstances, became hopelessly inconsistent; so that, for example, a man living on one side of an imaginary line might be lawfully married to a woman from whom the church would require him to separate if he were living on the other side.

§ 12. Extravagant and pernicious as some of the papal decrees undoubtedly were, and were afterwards confessed to be by councils which the Church of Rome calls general councils, they were, nevertheless, wholesome and beneficial in this respect, that, where they were received, they at least gave consistency and stability to the law of marriage.

§ 13. Or rather, they would have done so, but for the system of papal dispensations and appeals to Rome which gradually grew up everywhere. For as the impediments to marriage were multiplied by extravagant canonical regulations, there were comparatively few impediments that might not be set aside by a papal dispensation duly paid for; and there were hardly any marriages which might not easily be broken by papal authority on the ground (not to mention others) of some fanciful impediment of consanguinity or affinity, such as must usually exist between every living man or woman, and some thousands of persons of the same vicinage.

§ 14. Before the tenth century the contradictory canons of councils great and small, and the inconsistent decrees of different popes, had reduced the law of the church into a state of inextricable confusion, in which it continued until the twelfth century, when the labors of Gratian were devoted to the task of bringing order out of the existing chaos.

§ 15. Gratian, a monk of the order of St. Benedict, is said to have been engaged from A. D. 1127 until 1151, in compiling and arranging his *Concordia Discordantium Canonum*, a work of herculean magnitude

and difficulty, in which he collected and ingeniously reconciled the contradictory canons, decretals, and patristic teachings which were held to have the force of law in western Christendom. It is said that the work of Gratian was approved by Pope Eugenius III, A. D. 1152 or 1153, and was immediately adopted by the University of Paris. What is certain is that, under the name of *Decretum*, it speedily became authoritative everywhere, and that it is still the first and most important part of the *Corpus Juris Canonici*.

§ 16. What Justinian, by the help of Tribonian and many learned civilians, had done for the laws of the empire, this poor monk did, single-handed and in spite of difficulties that appeared to be insuperable, for the laws of the church. Probably no greater service to religion and morals was ever done by any uninspired man. In name and appearance, and doubtless in his own estimation, Gratian was merely a collector and commentator; in fact, he was the greatest Christian legislator who ever lived. As a collector he was entirely honest, but, at the same time, wholly uncritical. He received all former documents, codices, and collections as genuine, and apparently without investigation; so that the *Decretum* contains many canons ascribed to councils by which they were never adopted, decrees of popes by whom they were never issued, and passages from fathers of the church by whom they were not written. In reconciling the discrepancies and inconsistencies of different authorities his ingenuity was inexhaustible; but his greatest merits were the clear intelligence with which he apprehended the general

purpose of all the canons which related to a particular subject, the fidelity with which he endeavored to represent it, and the felicity with which he made the arrangement of his materials serve as a commentary on the materials themselves. Accepting faithfully, but uncritically, the canons of all councils, the decrees of popes, and the opinions of fathers, as alike representative of the mind and will of the church, he so combined them as to make them the collective canon law of western Christendom.

§ 17. An immediate effect of the publication of the *Decretum* was to reveal to the world the enormity of the system of impediments to marriage which had grown into existence; and the Fourth Lateran Council, by its fiftieth canon, removed the greater part of the grievance by permitting marriage beyond the fourth degree of consanguinity and affinity.

§ 18. By the Decretals of Pope Gregory IX., the prohibitions of marriage were further defined, and, for the most part, with humanity and reason. Like the work of Gratian, the Decretals profess only to give the canons, decrees, and patristic judgments already existing, and to a less extent they are critically inaccurate. Hence, the headings in which they are severally summarized or condensed are of as great authority as the text itself; for, by the fact of their publication, these headings became law to the Roman communion, while the occasionally apocryphal text is of value only, or chiefly, as an exposition or illustration of the heading.

§ 19. The legislation of the Roman Church concern-

ing marriage was further reformed by the Council of Trent, by which the Impediment of Spiritual Affinity was reduced from the absurd proportions to which it had reached by provincial legislation, and by the ambiguity of the words *compater* and *commater*, which had been used by provincial councils sometimes in a very narrow sense, and sometimes with such extravagance of latitude as to be almost incredible. Other invaluable reforms were made by the same council.

§ 20. It is to observed that the Council of Trent was the first which explicitly claimed for the church the right to create dirimant impediments Before that council, councils, popes and fathers had assumed no other right than that of declaring the law of God as they believed it actually to be. Even the Fourth Lateran Council, in repealing a large number of existing impediments, expressly admitted that they were statutes of men (*humana statuta*); but the Council of Trent claimed for the church the right of original legislation in these canons: (Sessio. xxiv., De Sacr. Matr., cc. 3, 4.) "If any man shall say that none but the levitical degrees of consanguinity and affinity are impediments forbidding marriage or voiding it if contracted; or if he shall say that the church hath not power to dispense with any of them, or to establish others of equal force to prohibit and void (*ut impediant et dirimant*); or if he shall say that the church hath not had power to establish impediments which void a marriage (*impedimenta matrimonium dirimentia*), *let him be anathema.*"

§ 21. The Anglican Church, from the earliest period

of the reformation, rejected the notion that the church has any power of original legislation in creating impediments to marriage. The acts of Parliament by which the previous decisions of convocation received the force of law repeatedly declare that marriage prohibited by God's law may not be dispensed with by human power, and that marriages not prohibited by God's law shall be good, lawful, and effectual. See, for example, (under *Affinity*) 25 Henry VIII., Cap. 22 (A. D., 1533), and 28 Henry VIII., Cap. 16 (A. D., 1526), of which the Tridentine canons of A. D. 1563, above quoted, were doubtless intended to be a flat contradiction.

§ 22. It is nevertheless to be observed that by assuming an independent power of establishing principles for interpreting "God's law," the Church of England virtually retained a limited but real and effectual power of original legislation. By "God's law," for example, marriage with a deceased wife's sister's daughter is nowhere expressly prohibited, but the Church of England, by adopting the rule of interpretation that marriage forbidden by God's law within a certain degree on one side, must be equally unlawful on the other, was compelled to prohibit such marriages, on the ground that God's law forbids marriage with a father's brother's wife.

§ 23. In the following pages will be found under appropriate titles: *A*, God's Law as contained in the Hebrew Scriptures; *B*, The laws of Rome so far as they affected the legislation of the church; *C*, The Law of the New Testament; *D*, Canons of Councils, De-

crees of Popes, and Judgments of the Fathers, including the actual Canon Law of the Church of Rome; and *E*, The Reformation Law of the Church of England. The *notes* are merely critical and expository; the *scholia* are intended not to form the judgment, but assist the study of the reader.

§ 24. The subject divides itself naturally into three parts, the first of which relates to Marriage in General, the second to the Impediments of Marriage, and the third to the Dissolution of Marriage, or Divorce.

PART FIRST.

OF MARRIAGE IN GENERAL.

The Contract of Marriage.

§ 1. Properly speaking, marriage is not a contract, but a state of life instituted and ordained of God; and the contract of marriage is an agreement between competent persons to live together in that estate according to God's holy ordinance.

§ 2. When the secular law declares that marriage is merely a civil contract, nothing more need be understood than that the secular law concerns itself only with the civil and secular aspects of the marriage contract.

§ 3. But if the laws of any state permit marriages which the law of God forbids, or if they permit a dissolution of the marriage bond for causes which the law of God does not allow, then such laws are a virtual and effectual abrogation of the state of marriage ordained of God, and a substitution for it of a mere contract of cohabitation.

§ 4. No matter what the secular laws may be, the church of God would cease to be a church of God, and would become a synogague of Satan, if it were to tolerate among its members such a desecration of God's

holy ordinance. Save to rebuke them and condemn them, the church knows no contracts of marriage, except that by which a man and woman consent together in holy wedlock, pledging their troth, each to the other, to live together in the holy estate of matrimony, as it has been instituted by God's ordinance.

The Divine Law.

§ 1. The account given in Genesis of the institution of marriage, clearly reveals the fundamental conditions of the holy estate of matrimony. Whether or not the story of the second chapter is to be understood historically or poetically, we may safely leave to the critics, so far as its connection with our present subject goes. Whether the story is a history of fact or a parable of truth, it at least conveys the doctrine of God concerning marriage.

Gen. i: 26–29. And God said, Let us make man in our own image after our likeness. So God created man in his own image; in the image of God created he him; male and female created he them.

Gen. ii: 18–25. And the Lord God said, It is not good that the man should be alone; I will make him a helpmeet for him. And out of the ground the Lord God formed every beast of the field and every fowl of the air * * * and Adam gave names to all cattle, and to the fowl of the air, and to every beast of the field; but for Adam there was not found an helpmeet for him. And the Lord caused a deep sleep to fall upon Adam, and he slept; and he took one of his ribs, and closed up the flesh instead thereof. And the rib which the Lord God had taken from man made he a woman, and

brought her to the man. And Adam said, This is now bone of my bone and flesh of my flesh; she shall be called Woman because she was taken out of man. Therefore shall a man leave his father and mother and shall cleave unto his wife, and they shall be one flesh. And they were both naked, the man and the woman, and were not ashamed.

§ 2. In the union of man and woman, according to the mind of the Creator as here represented, we observe: —

a. The evidence of perfect equality in their relations to each other, notwithstanding that the woman was made to be "an helpmeet for the man."

b. The absence of selfish concupiscence — "naked and not ashamed."

c. Their absolute unity — "one flesh."

d. The exclusiveness of their union, in which neither father nor mother can have a part, — one man, one woman.

e. Its indissolubility — "he shall cleave unto his wife."

Such is the original, ideal marriage, exhibiting equality with diversity, conjugal chastity, and a dual unity, which is exclusive and indissoluble.

§ 3. After the fall, we find an instant change in two particulars.

Gen. iii:16. Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.

§ 4. Here we observe: —

a. That by the entrance of concupiscence, there is an ethical change; though they are still "one flesh," they are not so nearly as before one soul. For the sake of order it is now necessary that the one "shall rule over" the other.

b. And by the increase of concupiscence, there is a physical change; the woman's "sorrow of conception is greatly multiplied."

c. There is no other change; they are still one flesh as before, and joined together in exclusive and indissoluble unity.

§ 5. This, then, is the estate of marriage ordained of God for his fallen creatures. With the ethics of the conjugal relation we are not concerned in this work, any more than with its physical functions, which are so nearly related to its morality. But even here it may be said that every violation of its exclusiveness or of its indissolubility must necessarily involve a threefold offence, first, against God's law; second, against the injured partner; and third, against society, of which the family is the God-ordained foundation.

§ 6. The legislation of our Blessed Lord concerning marriage was not, as some have foolishly supposed, "absolutely original." It was merely a restoration of the original divine law, and such he declared it to be.

Matt. xix: 4–6. Have ye not read that he which made them at the beginning, made them male and female and said, For this cause shall a man leave father and mother, and cleave unto his wife, and they twain shall be one flesh. Wherefore, they are no more twain but one flesh.

Mark x: 6–8. From the beginning of the creation God

made them male and female. For this cause shall a man leave his father and mother, and they[1] twain shall be one flesh; so then they are no more twain but one flesh.

§ 7. The exclusiveness and the indissolubility of marriage are precisely the same in these sayings as in the original enactment, except that both are emphasized; the former by the introduction of the word "twain," and the latter by the repetition, in both sayings, of the declaration that the twain "shall be (or *become*) one flesh."

§ 8. Our Saviour's doctrine of marriage in these respects was so clearly understood that it was not so much enforced as constantly implied by the teaching of the apostles.

§ 9. Leaving, for the present, particular passages which are elsewhere considered more minutely, the apostolic doctrine of marriage may be briefly summarized as follows: —

Marriage is an honorable estate (Heb. xiii: 4), indissoluble and exclusive (Rom. vii: 2, 3; 1 Cor. vii: 39), in which the husband is the head of the wife (Eph. v: 23), the woman being made for the man and not the man for the woman (1 Cor. xi: 8); therefore, the woman is not to usurp authority over the man (1 Tim. ii: 12), but to be obedient (Tit. ii: 5; 1 Pet. iii: 6), submitting herself (Col. iii: 18), with reverence (Eph. v: 33), and in subjection to her husband (1 Pet. iii: 5); while the husband is to love his wife

[1] The Westminister Version is better: *the twain shall become one flesh.*

as his own body (Eph. v: 28), even as Christ loved the church and gave himself for it (Eph. v: 25), and he is especially to honor his wife because of her weakness and dependence (1 Pet. iii: 7); the conjugal debt is to be duly paid by both parties (1 Cor. vii: 4, 5), and the chastity of both is a sacred obligation (Heb. xiii: 4; Rom. ii: 22).

The Hebrew Law.

§ 1. It was not before the sixth generation from Adam that Lamech, a descendant of Cain and himself a murderer, violated the exclusive unity of marriage by the practice of polygamy (Gen. iv: 19–24); and this is the only instance of polygamy recorded as occurring before the flood. If the practice became prevalent, at least it did not exist in the family of Noah, since we read (Gen. vii: 7, 13) that "Noah and his sons, and his wife," "and the three wives of his sons with them" went into the ark.

§ 2. When we come to the patriarchal period, we find the divine idea of marriage almost wholly lost, not again to be restored until after many ages. It was broken both in its exclusiveness and in its indissoluble permanence by polygamy and free divorce; of which polygamy alone may be treated here, divorce falling more properly under the head of the *Dissolution of Marriage*.

§ 3. The first form of polygamy mentioned among the patriarchs is that of Abram's concubinage with his wife's slave, Hagar, by his wife's request; the childless Sarai desiring to obtain children by her maid (See *Con-*

dition). A concubine, however, was not a wife, but remained a slave "under the hand" of her master and mistress. It was probably after the death of Sarah that Abraham married Keturah, and besides her he had concubines (Gen. xxv: 1, 6).

§ 4. Nahor, the brother of Abraham, also had a concubine, Reumah (Gen. xxii: 23, 24).

§ 5. Isaac seems to have had neither wife nor concubine besides Rebekah; but his two sons Esau and Jacob were both polygamists (Gen. xxvi: 34; xxix: 23, 28; xxx: 4, 9).

§ 6. At heart, however, it would seem that in the midst of practical polygamy, the instinctive affections of the partriarchs bore testimony that there is no true marriage but of one man and one woman for life and death. Thus when Jacob was commanding his sons to bury him with his fathers (Gen. xlix: 29–32), he seemed quite to forget Rachel and his concubines, and to think only of his first wife, the too-little loved, blear-eyed Leah, who had borne his first-born son. "Bury me," he said, "in the cave that is in the field of Ephron the Hittite. There they buried Abraham and Sarah, his wife; there they buried Isaac and Rebekah, his wife; and there I buried Leah."

§ 7. The law of Moses did not forbid polygamy, but cannot be said to have favored it. The only passages in which it is recognized are Exod. xxi: 7–11, where the law is intended to protect a girl sold by her father to be a wife of her master; Deut. xxi: 15–17, where it is intended to protect the rights of the children of one wife who is "hated" against the partiality of their

father for the children of another wife who is "beloved;" Deut. xvii: 17, where Moses forbids the kings of after times to "multiply wives" unto themselves; and the famous but doubtful passage in Lev. xviii: 18, which forbids the taking of "a wife to her sister to vex her, to uncover her nakedness in her lifetime."

§ 8. In the times of the judges polygamy was practised apparently by all who could afford it Gideon who had seventy sons (Judges, viii: 30) must have had many wives or concubines, and the same observation applies to Jair who had thirty sons (x: 3), Ibzan of Bethlehem who had the same number (xii: 8, 9), and Abdon who had forty. Elkanah, the father of the prophet Samuel, had two wives (1 Sam. i: 1, 2.)

§ 9. By the kings of later times, polygamy was carried to great excess. Besides Michal (2 Sam. iii: 13–16) and the wives of Saul (xii: 8), David had six wives before he married the wife of Uriah, and he had many concubines who seem hardly to have been thought worth counting (1 Chron. iii: 1–9). The record of Solomon, though probably not more closely kept, is sufficiently extravagant, for "he had seven hundred wives, princesses, and three hundred concubines" (1 Kings, xi: 3). Rehoboam had eighteen wives and sixty concubines (2 Chron. xi: 21). Abijah had fourteen wives (xiii: 21). Joash had two wives (xxiv: 3). Ahab had seventy sons (2 Kings x: 1).

§ 10. And yet, in spite of these examples of exhorbitant polygamy, the divine idea of the family as the union of one man with one woman never died out. In

poetry the one wife was the ideal, as in Psalm cxxviii: 3, "thy wife shall be as a fruitful vine by the side of thine house; thy children like olive plants round about thy table." So in Proverbs v: 18, 19, "Rejoice with the wife of thy youth. Let her be as the loving hind and the pleasant roe; let her breasts satisfy thee at all times, and be thou always ravished with her love." It is difficult to conceive of such a counsel being written in a harem of a thousand women; and from Prov. xviii: 22; xix: 14; xxxi: 10–31, it is very evident that beyond the king's palace, polygamy could not have been prevalent.

§ 11. In the post-Babylonian period polygamy had almost if not altogether ceased, as seems to be evident from the books of the Apocrypha which give no intimation of its existence among the Jews. The twenty-sixth chapter of Ecclesiasticus is entirely monogamic in its conception of the sphere of a virtuous woman. And yet Herod the Great had at one time no less than nine wives. (Joseph. Antiq. xvii:1, 3.)

The Roman Law.

§ 1. The conception of the state of marriage represented in the ancient law of Rome is exceedingly noble. It was from the ancient laws, and not from any foreign source that these definitions were obtained.[1]

Justin. Inst. lib. I. tit. ix. 1. Marriage is the union of a man and a woman, including an inseparable association of their life.

[1] Nuptiæ autem, sive matrimonium est viri et mulieris conjunctio, individuam vitæ consuetudinem continens.

Dig. lib. xxiii. tit. ii. 1. Marriage is the union of a male and a female, the association of their whole life, the communication of rights divine and human.[1]

§ 2. The two divinely instituted characteristics of exclusiveness and indissolubility could hardly be expressed more clearly or more emphatically than by these definitions.

§ 3. Marriage was contracted under the ancient law of Rome by *Confarreatio*, *Coemptio*, and *Usus*.

§ 4. *Confarreatio* was a rite of great solemnity, in which the augurs were consulted, sacrifices were offered, and the parties to the marriage joined in partaking of cakes made of meal (*far*), whence the rite took its name. Certain priestly officers, as the *Flamen Dialis*, were required to have been born of parents married by confarreation (*parentes confarreati*). *Coemptio*, though less solemn than confarreation, was a sacred ceremony in which the augurs were consulted, and there was a symbolical purchase of the woman by the man or by his father for him. The effect of either of these ceremonies, was that the woman passed at once out of the power (*potestas*) of her father into the hand and power of her husband. Thenceforward she was the head of his household, and was dignified with the name of *materfamilias*, though she might have no children, but in the eye of the law she held simply the position of a child (*filiæ locus*), and was under his authority as such. Thus she became a member of his

[1] Nuptiæ sunt conjunctio maris et feminæ, consortium omnis vitæ, divini et humani juris communicatio.

tribe, his *gens*, and his family, and was received under the protection of his household gods, so that the marriage included a "communication (to the wife) of all rights divine and human."

§ 5. *Usus* was simply a legal contract of marriage without formal ceremony. It was as valid as coemption or confarreation; but it did not at once subject the wife to the power of her husband. She did not take the position of a daughter to him; and hence, though she was a lawful wife and a matron (*uxor et matrona*) even before she was a mother, she was not *materfamilias*, because she could not in the eye of law or custom be regarded as head of a family to which she had not been legally transferred. If, however, the wife remained under her husband's roof continuously for a whole year, she passed under the power of her husband as effectually as if she had been married by coemption or confarreation. To avoid this, one of the oldest laws of Rome, contained in the sixth of the Twelve Tables, provided that if a wife should sleep for three nights in a year out of her husband's house, she should not be subject to his paternal power.

§ 6. Many marriages were entered without any legal contract (*sine conventione*), but with a distinct understanding of the parties that their association was marriage and not concubinage nor fornication. The evidence of such a marriage was merely the acknowledged matrimonial cohabitation of the parties (*cohabitatio matrimonii causa*) for the ascertainment of which there were several rules of law. Such a marriage was regarded by the law as equally valid with a

regularly contracted marriage (*connubium cum conventione*). The statement of the law by Justinian (Nov. 89. c. 1.) is explicit: "Legitimate children are born of marriages contracted with formal instruments of dower (*cum dotalibus instrumentis*) or even without such, when men are united with women having from the outset the intention of contracting a marriage."

§ 7. The definitions of marriage above given excluded every form of polygamy, and hence there was no such concubinage among the Romans as there was among the Hebrews. A law of Constantius, A. D. 320, declaring that "no married man may have a concubine during the existence of his marriage," shows that such a law, which would never have been needed in the earlier days of the republic, had become necessary under the empire.

§ 8. Among the Romans concubinage was an unequal marriage between a man of rank and a woman of inferior condition. (See *Condition.*) The wife did not become a member of her husband's *familia*; hence she could not be *materfamilias;* and she was not allowed the honorable titles of *uxor* and *matrona*, since a matron must be a wife, and the Roman law required that a wife should be the equal of her husband. But the concubine was not infamous; though no formal divorce or message of repudiation was necessary to dismiss her, she was not regarded as a harlot or a kept mistress; her children were not called bastards, but *natural* children; and although earlier laws were severe in prohibiting the father from bestowing his fortune upon natural children to the prejudice of his

legitimate heirs, later legislation provided that they and their mother should receive a certain proportion of their father's estate. The practice of concubinage in the Roman sense of the word continued long after the rise of Christianity. Indeed, some features of it still continue in the morganatic marriages of European sovereigns with women who are not of princely rank.

§ 9. In ancient times the position of the concubine was often accepted, not of choice but of constraint, by a slave woman to her master; and of such a concubine the church wisely and humanely required no more than that she should observe conjugal chastity by "forsaking all other and keeping only unto him." Moreover, the influence of the church at length availed to procure legislation which permitted the concubine to be made a lawful wife, and her children to be made legitimate, if her husband chose.

PART II.

OF THE IMPEDIMENTS OF MARRIAGE.

I. Of Impediments in General.

§ 1. The impediments of marriage are divided by canonists into two classes, viz.: *Prohibitive* and *Dirimant*.

II. Of Prohibitive Impediments.

§ 2. Prohibitive impediments are obstacles or prohibitions which forbid a marriage altogether, or which forbid it to be contracted in a certain way, but which are not such as to make it void if actually contracted notwithstanding the prohibition. Thus, if two persons are solemnly betrothed to each other, the contract into which they have entered forbids either of them to marry a different person; and yet if either party breaks the engagement and enters into another marriage, the marriage holds good notwithstanding the previous betrothal. Again, in many places the canons of the church and the laws of the land forbid marriage without the previous publication of the intention of the parties to marry; but before A. D. 1563 neither the canon law nor the law of the state declared a marriage to be void which had been otherwise lawfully contracted and consummated, though the banns might not

have been published. In such cases the impediments or obstacles prohibit, but do not invalidate;

Impediunt fieri; permittunt facta teneri.

§ 3. An example of prohibitive impediments may be found in the discipline of the early church concerning digamists. Second marriages were discountenanced to such a degree that persons who contracted them were subjected to rigorous penance, but they were never held to be void except by the schismatical sect of the Cathari.

§ 4. In the modern canon law of the church of Rome there are four prohibitive impediments included in the line:

Ecclesiæ vetitum, tempus, sponsalia, votum;

i.e., a prohibition of the church, a prohibited time, betrothal, and a simple private vow of celibacy or promise to enter a religious order. The first of these has been illustrated in the example of the canons which require publication of the banns of marriage; and betrothal has been sufficiently explained for the present purpose. The impediment of time refers to the rule of the Roman Church which forbids marriages to be celebrated from the first Sunday in Advent to Epiphany, and from Ash Wednesday to the Sunday after Easter inclusive. The impediment of a simple vow or promise to enter into a religious order is held by modern canonists of the church of Rome to differ from a solemn profession of celibacy as betrothal differs from marriage; it is a sin to recede from such a vow; but a marriage contracted in violation of it is not void.

§ 5. By examining the canons hereafter given it will be seen that some of these impediments were more

gravely regarded in former ages than they are now, and that the precise distinction between prohibitive and dirimant impediments is comparatively modern.

§ 6. Some canonists have adopted, as a rule in the interpretation of canons, this distinction: that if the word *solvere*, *avellere*, *separare* (*i.e.*, to dissolve, break up, separate), is applied to the marriage itself, the impediment must have been dirimant; but if the word *separare* is applied to the persons, the separation may be only *à mensa et thoro*, and, in that case, the impediment must have been prohibitive. The objection to this theory is that it has been made to adjust the ancient canons to the Roman theory of the indissolubility of marriage. I can only say that I have not found it to be of any great use in an honest interpretation of documents.

§ 7. The distinction of Impediments to Marriage as *Notorious* or *Secret*, being applicable only in papal dispensations, need not occupy our attention.

§ 8. The distinction of Impediments, as originating in the law of *nature*, in positive *divine* law, or in the law of the *church* needs no explanation.

II. Of Dirimant[1] Impediments.

§ 1. Dirimant Impediments are so called from the Latin word *dirimere*, which singifies to *sever*, *separate*,

[1] I am not at all sure that the word *dirimant* is a duly naturalized English word; but I know no other which will express the same meaning, and therefore necessity may excuse its novelty. I have hesitated whether to write *diriment*, following the Latin, or to take the actual and, in canon law, common word *dirimant* from the French, but I have preferred to take the adjective which already exists in French, rather than to coin a word entirely new.

divide, *dissolve*; and they are such as not merely to forbid a marriage, but also to make it null and void, however solemnly contracted. A marriage barred by a dirimant impediment is not a marriage, but a crime which the church requires to be dissolved by the separation of the parties.

§ 2. In canon law the number of dirimant impediments usually given is fifteen, which are named in the following mnemotechnic verses: —

Error, Conditio, Votum, Cognatio, Crimen,
Cultus Disparitas, Vis, Ordo, Ligamen, Honestas,
Ætas, Affinis, si Clandestinus, et Impos,
Raptave sit mulier nec parti reddita tutæ;
Hæc socianda vetant connubia, facta retractant;

that is to say, Error on the part of one of the contracting parties; Disparity of Condition, if one be free and the other a slave; a Vow of Celibacy; Consanguinity; Crime; Disparity of Religion; Violence; Holy Orders; Precontract; Public Decency; Age; Affinity; Clandestinity; Impotence; Abduction. Some canonists would insert *Amens* instead of *Ætas*, in the third line, thus omitting the impediment of *Age* and inserting that of *Insanity*, but the change seems to be undesirable as well as unnecessary.

§ 3. Dirimant impediments may be conveniently classified as follows: —

a. Such as are caused by some previous relation or disparity existing between the parties, viz.: Consanguinity, Affinity (which includes the artificial tie of Spiritual Affinity through

baptism and sponsorship), and Disparity of Religion or of Condition.

b. Such as are caused by incapacity of the persons, viz., Age and Impotence (physical or mental).

c. Such as are caused by some previous obligation of the parties, viz., Pre-contract, Vow of celibacy, and Holy Orders.

d. The disqualification of either party because of Crime.

e. Circumstances which prevent freedom of contract, viz., Violence, Abduction, and Error.

f. The injury to the church and to the commonwealth which would arise from Clandestinity or an offence against Public Decency.

In this order we shall proceed to consider the impediments of marriage.

IV. The Impediment of Consanguinity.

Consanguinity is the relationship existing between persons descended from a common ancestor of either sex.

A. The Hebrew Law.

§ 1. The instinctive horror with which we regard the sexual union of persons nearly related in blood, was not universal among the earlier races of mankind. In Persia marriage with mothers was common, and, as Gibbon says (Decline and Fall, chap. 44), "In Egypt the marriage of brothers and sisters was admitted without scruple or exception. A Spartan might espouse the daughter of his father, an Athenian that of his mother, and the nuptials of an uncle and his niece were applauded at Athens as a happy union of the dearest relations."

§ 2. In the patriarchal age some such marriages were freely contracted among the Hebrews, thus: —

a. Abram married Sarai, his half-sister, the daughter of his father, but not of his mother (Gen. xx:12).

b. Nahor, the brother of Abram, married Milcah, the daughter of his brother Haran (Gen. xi: 29).

c. Amram, the father of Moses, married Jochebed, his father's sister (Exod. xi: 20).

d. Even so late as the time of David, Tamar seems to have thought that there was no insuperable obstacle to her marriage with her half-brother, Amnon. (2 Sam. xiii:13; I pray thee speak unto the king, for he will not withhold me from thee.)

§ 3. Marriage with kindred was the patriarchal rule.

a. Gen. xxiv: 3, 4. Swear * * * that thou shalt not take a wife unto my son of the daughters of the Canaanites among whom I dwell, but thou shall go unto my country, and to my kindred and take a wife unto my son Isaac.

b. Gen. xxviii:1, 2. And Isaac said to Jacob, Go to Padan-aram, to the house of Bethuel, thy mother's father, and take thee a wife from thence of the daughters of Laban, thy mother's brother.

c. Gen. xxvi: 34, 35; xxviii: 8, 9. Esau's marriage with the daughters of two Hittites, were a grief of mind to Isaac and Rebekah; therefore, to please his parents, he married Mahalath, the daughter of Ishmael, his father's brother.

§ 4. The opinion that the patriarchs desired the marriage of their children with kinswomen on account of religion, is not tenable, since the kindred of Abraham were idolators. (See Gen. xxxi: 19, 30, 32.)

§ 5. By the law of Moses, marriage with any person nearly related in blood was solemnly prohibited.

(1.) By general enactment.

a. Lev. xviii: 6. None of you shall approach to any that is near of kin to him to uncover her nakedness; I am the Lord.

b. Lev. xviii: 12, 13. (Observe the reason of particular prohibitions.) She is thy father's, . . . mother's . . . near kinswoman.

(2.) By special and particular prohibitions which forbid the following marriages: —

a. A son with his mother; Lev. xviii: 7.

b. A father with his daughter; Lev. xviii: 17.

c. A brother with his sister, whether of the whole or of the half-blood; Lev. xviii: 9; xx: 17; Deut. xxvii: 22.

d. A grandfather with a granddaughter, Lev. xviii 10.

e. A nephew with his aunt; Lev. xviii: 12, 13; xx: 19.

§ 6. Among these particular prohibitions we do not find marriage with a grandmother or with a niece. From this circumstance it has been inferred that the list was not intended to be exhaustive; and that these exceptions, and possibly other marriages, as that of cousins german, are included under the general law of Lev. xviii: 6, above given. It is answered, first, that among the Israelites marriage with a grandmother would have been considered so infamous an enormity that no special prohibition of it was necessary; and second, that the Israelites themselves never understood marriage with a niece, nor, certainly, with a cousin ger-

man, to be forbidden by the law. One case of such a marriage, though a doubtful one, is found in Holy Scripture (Josh. xv:17), where we read that Othniel, the brother (?) of Caleb, married his niece (?) Achsah; but that the Israelites permitted such marriages without scruple is beyond a question.

B. The Roman Law.

§ 1. The civil law as given by Justinian is as follows: —

Inst. i:10. It is not lawful for us to marry any woman indiscriminately, for with some women marriage is to be avoided.

1. Marriage between persons who sustain a parental and filial relation to each other cannot be contracted; as between a father and daughter, a grandfather and granddaughter, a mother and son, grandmother and grandson, and so on *ad infinitum*, and if such persons intermarry, their nuptials are nefarious and incestuous. So firmly does the rule hold that, although the parental relation may have been formed by adoption, the parties cannot marry even after the adoption is dissolved. Therefore, if any woman has ever been your child or grandchild by adoption, you can never marry her although you may have emancipated her.

2. Between persons who are collaterally related a like rule exists but not so far-reaching. A brother and sister whether of the whole or of the half blood, cannot marry, and if any woman is your sister by adoption, assuredly you cannot marry her so long as the adoption exists; but if the adoption is dissolved by emancipation, or if you yourself have been emancipated, you may marry her; and hence it is a rule of law that if a man

desires to adopt his son-in-law, he must first emancipate his daughter, or if he desires to adopt his daughter-in-law, he must first emancipate his son.

3. It is unlawful for a man to marry the daughter of his brother or sister, or his brother's or sister's granddaughter, although they are related to each other in the fourth degree, for it is forbidden to marry any man's granddaughter whose daughter may not be taken in marriage. Nevertheless, you are free to marry the daughter of a woman whom your father has adopted, since she is connected with you neither by natural nor by civil law.

4. The children of a brother and sister, or of two brothers or two sisters, may intermarry.

5. It is unlawful to marry a father's sister or a mother's sister (even by adoption), since they stand in *loco parentis*, whence also it is evident that a man may not marry his grand aunt on either side.

§ 2. The earlier law of Rome was the same as that of Justinian, except that the marriage of cousins german was disallowed, at least by custom but the the objection to it had passed away by the second century before Christ.

§ 3. Marriage with a niece was always held to be incestuous until the time of Claudius, who obtained from the Senate a decree intended to legitimate his marriage with Agrippina, that marriage between an uncle and his brother's daughter should be lawful. Accordingly we read in the Institutes of Gaius (I. 62) "It is lawful to marry a brother's daughter, and it first began to be done when the divine Claudius had married Aggrippina, his brother's daughter; but to marry

a sister's daughter is not lawful." Marriage with a niece, however, never was sanctioned by public opinion, and when it was prohibited by the Christian empire, the prohibition was rather a restoration of ancient Roman law than the enactment of a Christian law, especially as the Christians at that time had no written law on the matter, except the law of Moses which did not in terms forbid the marriage of an uncle with his niece.

§ 4. Thus the law of Rome concerning the impediment of consanguinity perfectly agreed with the law of Moses and extended it to marriage with a niece. It added, however, two ideas which were destined in after ages to enter into the mind of the church, and profoundly affect its legislation.

§ 5. The first of these was the prohibition by continuous descent (see above, Inst. I. 10, 3): It is forbidden to marry any man's granddaughter, whose daughter may not be taken in marriage. This law beyond all question, had a weighty influence in forming the prejudice which afterwards extended the impediments of consanguinity and affinity to the seventh generation, *i.e.*, to the fourteenth degree of the civil law.

§ 6. The second was that of *Adoption*. By the law and custom of Rome, frequently practised, a person male or female, minor or adult, might be adopted into the family of another and become his child. The transaction was not regarded as a legal fiction, but as a solemn and permanent fact. The person thus adopted bore the name, was legally and morally subject to the

power, and was rightfully entitled to a child's share of the property, of his adopted father. All other members of the family, whether by blood or adoption, were his brothers and sisters. Hence marriage between him and them was impossible.

§ 7. Together with the law of adoption stood the power of Emancipation. A Roman never ceased to be a minor so far as his father was concerned. In the forum or the field he was a citizen; but, though he might be a senator or a commander, he was still subject to the absolute control and command of his father so long as his father lived, unless the father set him free by a solemn act of emancipation. An adopted child might also be emancipated; but, so far as marriage was concerned, the bond created by adoption was indissoluble, even by emancipation, as between the child and the adoptive parents. Between adoptive brothers and sisters, however, the parental bond might be broken by the emancipation either of the adopted child, or of the child by blood. So stringent was the law in this respect, that if a father wished to adopt a person who had married one of his children, he was required first to emancipate his own child, or the marriage would have been regarded as incestuous.

§ 8. Not only did the church comply with these laws of the state, but the idea of adoption was at length transferred to the spiritual bond between a baptizer and the person baptized, and also between the sponsor and the baptized person. Out of this idea, thus misplaced, arose the impediment of spiritual affinity, and all the confusions which resulted from it.

C. The Law of the New Testament.

The New Testament contains no laws relating to the impediment of consanguinity.

D. Canons of Councils, Decrees of Popes, and Judgments of Fathers.[1]

1. *S. Basil.* (A. D. 370) cc. 67, 68, 75. Incest with a sister or half-sister is to be punished with the penance of a murderer; and all incestuous conjunctions as adultery.

2. *Conc. Roman.* (A. D. 416) sub Innocent. I., Papa. It is not lawful to marry the widow or the son of an uncle.

3. *Conc. Tolet. II.*, (A. D. 527), c. 5. No Christian man shall seek to have a kinswoman of his own blood joined to him in marriage, to whatever degree of kindred he may know the lines of his race (to extend).

4. *Conc. Turon.* (A. D. 567), c. 21. Recites the prohibition of Leviticus xviii., and adds a prohibition of marriage with a niece, cousin, or wife's sister.

5. *Conc. Matiscon. II.*, (A. D. 585), c. 18. Incestuous copulation to which the laws refuse the name of husband,

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[1] The authorties cited throughout this work under this head are chronologically arranged. The connection of particular citations is pointed out in the appended Scholia. For convenience in cross-reference from one subject to another, the citations under this head are numbered consecutively to the end; thus 100 signifies the hundreth citation under the head D. wherever it may chance to be found in this book.

Note also that the canons, etc., on the subject of consanguinity are so connected with those which relate to affinity that it is often difficult to decide under which title to insert them. In some instances it has been necessary to avoid repetition by postponing certain documents to the end of the impediment of Affinity.

wife, or nuptials, the Catholic Church abominates, and promises severely to punish those who, in their lustful heat. contemn degrees of birth, and wallow in their filth like shameful swine.

6. *Greg. I., Papa* (A. D. 597–604), Epist. ad August. Cant. Ep. c. 27. (Apud Bedam l. 1.) In answer to the question "to what degree the faithful may intermarry with their kindred" Gregory says: A certain worldly law of the Roman commonwealth allows cousins german to marry; but we have learned by experience that no offspring can come of such wedlock, and the divine law forbids a man to uncover the nakedness of any one who is near of kin to him. Hence, of necessity, it must be in the third or fourth generation only that the faithful can intermarry. In the second generation of which we have spoken they must altogether keep apart.

7. *Conc. Londin.* (A. D. 605). A synod held at London by Augustine and his comprovincials, declared marriages in the third degree, and marriages with consecrated women, to be void.

8. *Conc. Rhem.* (A. D. 630), c. 8. Forbids incestuous marriage under penalty of excommunication, and directs that the property of the parties be given to their relatives.

9. *Gregorius III., Papa*, (A. D. 731–741), Ep. ad Bonifacium. You ask to what degree the descendants of relatives are forbidden to intermarry. We answer that they ought not to marry to the seventh generation, nor so long as they know that any relationship exists between them; but since some allowance must be made, especially among so barbarous a people, we must allow them to be married after the fourth generation.

10. *Conc. Rom.* (A. D. 743), sub *Zachar. Papa*, cc. 6, 15. Forbids marriage with cousin, niece, mother-in-law,

brother's wife and all relations. It declares, also, that, although Gregory had permitted marriage between persons not related in the fourth degree, the permission was granted only on account of the rudeness of the people concerned, and that no marriage ought to be contracted between parties who are known to be related in any degree whatever.

11. *Conc. Vermer.* (A. D. 753), c. 1. Persons who have married in the third generation (*in tertio genu!*) shall be separated, and when their penance is ended, they may marry, if they will. But if any be married in the fourth degree, those we do not separate though we prescribe a penance for them; and if the union has not already been made, we grant no permission to marry in the fourth degree.

12. *Conc. Compend.* (A. D. 756.), c. 1. If persons are found to be married in the fourth generation (*progenie*) we do not separate them; but if they are found married in the third, let them be separated. And if any be found married of whom one is in the fourth and the other in the third, we separate them.

13. *Conc. Mogunt.* (A. D. 813), c. 54. We command that none shall be any longer united in marriage in the fourth generation, and if after this interdict, any be so found let them be separated.

14. *Conc. Mogunt.* (A. D. 847), c. 30. Repeats the Canon of the Council held at the same place, A. D. 813.

15. *Conc. Wormat.* (A. D. 868), c. 32. In marriages of the faithful it shall not be lawful for any Christian man to take a wife of his own blood or kindred so long as their descent is recorded, or known, or remembered.

16. *Leo VII., Papa*, (A. D. 936–939), Epist. ad Germanos. Let no one presume to marry his cousin-german, or his stepmother, or his niece, or his brother's wife, or his

mother-in-law, or any woman who is of his own kindred, or whom a kinsman has had.

17. *Conc. Confluent.* (A. D. 922), c. 1. No Christian shall marry a kinswoman within the sixth generation.

18. *Conc. Roman.* (A. D. 998 or 999), c. 1. It is adjudged that Robert, King of France, who has married his kinswoman Bertha, shall put her away and be under penance seven years; if he refuse to submit, let him be anathema; and the same is decreed concerning Bertha. [They were, in fact, cousins in the fourth degree, and Robert had been godfather to one of Bertha's children by her former marriage. Milman's Lat. Christ. III., 390. They submitted and separated.]

19. c. 2. Archibald, Archbishop of Tours, who was the consecrator of such a marriage, and all the bishops who were present and consenting to the incestuous nuptials of the King with Bertha his kinswoman, we suspend from communion, until they shall come to make satisfaction to this Apostolic See.

20. *Conc. Aenham.* (A. D. 1009), c. 8. No one shall take a wife of his kindred within the fourth degree (or generation, *geniculum*), nor the widow of any one so related to him, nor the niece or near kinswoman of his former wife, nor a professed nun, nor his godmother, nor a divorced woman, nor a second wife while the first lives, but while she lives she alone shall be his.

21. *Conc. Salegunstadt.* (A. D. 1022), c. 11. Whereas, some have reckoned that a brother and sister are related in the first degree, the holy Synod, following the ancient fathers, declares that it is not so, but that the son and daughter of a brother and sister are to be considered related in the first degree.

22. *Conc. Bituric.* (A. D. 1031), c. 17. No one shall take a wife of his kindred unto the sixth or seventh generation.

23. *Conc. Rotomag.* (A. D. 1072), c. 14. Before the marriage benediction is pronounced the descent of the parties shall be diligently investigated, and if any relationship between them shall be discovered within the seventh generation, or if either of them have been divorced, they shall not be married, and the priest who shall do otherwise shall be deposed.

24. *Conc. Lateran. IV.* (A. D. 1215), c. 50. The prohibition of marriage shall not for the future extend beyond the fourth degree, whether of affinity or consanguinity, since beyond that degree it is not possible that such a rule should be observed. But forasmuch as the prohibition of marriage is now restricted to the fourth degree, we will that it be henceforth perpetual, any previous constitution of others or of ourselves to the contrary notwithstanding.

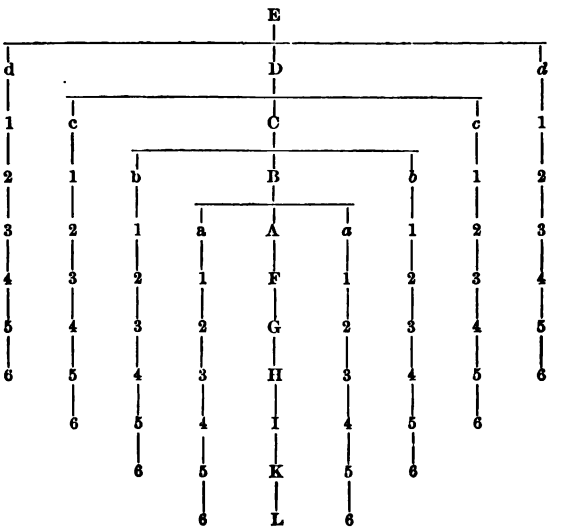
25. *Provincial Constitutions* of John Stratford Abp. of Canterbury, (A. D. 1342). By authority of the present council we ordain that any persons contracting marriages, knowing that such marriages are forbidden by canonical impediments, or that there is a probable presumption of such impediments, shall be liable to the sentence of the greater excommunication.

NOTES ON THE CANONS, ETC.

§ 1. In order to make any intelligent use of the canons relating to consanguinity and affinity, it is necessary first to understand the method of computing the degrees of consanguinity. To this end the following diagram has been prepared.

DIAGRAM

SHOWING THE DEGREES OF CONSANGUINITY TO THE SEVENTH DEGREE, ASCENDING, DESCENDING, AND COLLATERAL.



EXPLANATION. — Let A represent the person whose degree of consanguinity to some other person is to be ascertained. In the *ascending* line, B represents his father or mother; C, his grandfather or grandmother; D, his great grandfather or great grandmother; E, his great great grandfather, or his great great grandmother. In the *descending* line F represents his son or daughter; G, his grandchild of either sex; H, his great grandchild; I, his great great grandchild, and so on. The collateral branches are represented as follows: a and *a* represent the brother and sister respectively of A; b and *b*, the brother and sister of B; c and *c*, the brother and sister of C; d and *d*, the brother and sister of D. The

descendants of collaterals are indicated by numerals under the letters which stand for the collateral relative designated, thus 1 under the letter c (which may be called c 1) denotes a child of c (that is, of C's brother); 2 under *b* (*b* 2) denotes a child of the second generation in descent from *b*, that is to say, a grandchild of B's sister; and so on.

§ 2. Since consanguinity exists only between persons who are descended from a common ancestor, the nearness or remoteness of their relationship to each other depends upon the nearness or remoteness of their descent from the common ancestor.

§ 3. The nearness or remoteness of a *descendant from a given ancestor* is measured by the number of generations between them; thus A is in the first generation from B, and in the fourth from E. A generation is commonly called a *degree;* thus A is in the first degree from B, and in the third from D.

§ 4. The Canon Law, in computing the degree of consanguinity between *collaterals*, considers only their distance from the common ancestor, and assumes that every generation or degree of descent includes all collateral relatives of the same degree and of every other degree between it and the common ancestor. Thus, A being in the fourth degree of descent from E, and the fourth generation being held to include all collaterals of the first, second and third generations, A is in the fourth degree from d and *d*, though *they* are in the first degree from the common ancestor, also with d 1 and *d* 1 who are in the second degree from E, and with d 2 and *d* 2 in the third, as well as d 3 and *d* 3 who, like A, are in the fourth degree of descent from the common

ancestor, E. In like manner A, being in the third degree from his ancestor D, is by the Canon Law in the third degree of consanguinity with his collaterals c, *c*, c 1, *c* 1, c 2 and *c* 2.

§ 5. Hence, to compute the degree of consanguinity between two persons according to Canon Law we have two simple rules: —

1st. If the persons are both in the same degree of descent from the common stock, that is their degree of consanguinity to each other. Thus a, A, *a* are in the first degree; b 1, *b* 1 are in the second; d 6 and *d* 6 are in the seventh.

2d. If the persons are in unequal degrees of descent from the common ancestor, the degree of the more remote from their common ancestor is the degree of their consanguinity to each other. Thus A, is equally related to d, d 1 and d 2, in the fourth degree of consanguinity.

§ 6. The Civil Law differs from the Canon Law in its computation of the degree of consanguinity between collaterals. Its rule is to count the degrees from either party upward to the common stock, and then downward from the common stock to the other party. Thus, to ascertain the degree of consanguinity between A and d 2, we count upward from A to E, the common ancestor, *four* degrees; then downward from E to d 2, *three* degrees more; and we find the required degree to be the *seventh*. Or, to use the illustrious instance given by Blackstone (Com. ii: 14, 207), King Henry VII. and Richard III. were both descended from Edward III., and their exact relationship will be indi-

cated if we let A in the table represent Richard, E, Edward, and d 4 Henry. Since A is in the fourth, and d 4 in the fifth degree from E, Henry and Richard were related, by the Canon Law, in the fifth, and by the civil law in the ninth degree of consanguinity.

§7. It is difficult, without reflection, to conceive the difference between a rule prohibiting marriage within certain degrees as understood in the language of civil law and the same rule interpreted in the later sense of the canon law. In the canons, for example, which forbid marriage in the seventh degree, it is not enough to observe that by the civil law the prohibition would only extend from A to d 2, c 3, and b 4, on either side, while, by the canon law, it would forbid the marriage of H with any person represented in the table. The number of persons actually affected by such prohibitions must also be considered; and if we make the very moderate estimate that the average duration of the life of persons who marry is only fifty years; that the average number of children who marry is only three in each family; and that they are born when their fathers are twenty, thirty, and forty years old respectively; the result is that, under the civil law, every man would be forbidden to intermarry with ninety-two living women, while by the canon law there would be 9,168 living women with whom he was forbidden to marry. If we add to this, as the case requires, that affinity was coextensive with consanguinity, it is difficult to conceive that, before the Fourth Lateran Council, more than an insignificant number of the marriages contracted were canonically valid.

§ 8. It is very evident that the canonical method of computing degrees of consanguinity grew up slowly through the use of the words *generatio*, *genus*, *progenies*, in the sense of *generation*. Gregory III. uses the word generation, apparently avoiding the technical language of the civil law; and the first canon of Compiegne (A. D. 756) shows that the reckoning of the civil law was still borne in mind, while the language of the canons was used. From the absurd eleventh canon of Seligenstadt (A. D. 1022) it appears that the method of reckoning according to either system had, at that time, become hopelessly confused; and it is probable that in different provinces, or at different times in the same province, one and the same canon may have been so differently construed as to furnish two widely different and contradictory statutes. Many causes combined to bring about a general interpretation of canons in the wider sense, which thus became the fixed rule for the computation of degrees of consanguinity in canon law; but the result was found to be so intolerable that the sweeping reform of the Fourth Lateran Council became absolutely necessary.

Scholia.

1. In the canons above given, and in others to be given hereafter, the following marriages are particularly forbidden; —

a. With a sister or half-sister, 1.

b. With a niece, 4, 10, 16, 26, 41, 48, 49.

c. With a cousin-german, 2, 4, 6, 10, 16, 35, 37, 39, 40, 41, 42, 46, 49.

2. The following general rules are laid down: —

a. All civil prohibitions are binding on Christians, 5.

b. Marriage in the second degree is void, but permissible in the third or fourth, 6.

c. In the third degree void, 7, 12.

d. In the fourth and third void; in the fourth tolerated, 12.

e. In the fourth forbidden, 20.

f. In the fourth to be void in the future, 13, 14.

g. In the fourth voided, 18, 19.

h. Within the sixth degree forbidden, 17, 23.

i. Forbidden to the sixth or seventh, 22.

k. To the seventh with indulgence to barbarians after the fourth, 9.

l. To the seventh without qualification, 9, 21.

m. To any relative however remote, 3, 10, 15, 16, 35, 37, 39, 49.

n. All prohibitions beyond the fourth degree were repealed by the Lateran Council, 24.

E. Anglican Reformation.

The action of the Church of England touching prohibited degrees of consanguinity and affinity will be inserted together at the end of the chapter on the Impediment of Affinity.

V. THE IMPEDIMENT OF AFFINITY.

§ 1. Affinity is the bond of relationship between two persons one of whom has married a blood relation of the other; thus, if A marries a sister of B, A and B are related by affinity; or, in popular language, they are *brothers-in-law*.

§ 2. In canon law affinity arises also from illicit unions; thus, if A has carnal knowledge of B's sister without marriage, A and B are held by canon law to be related by affinity.

§ 3. Degrees of affinity are the same as the degrees of consanguinity from which they take their rise; thus, in the case supposed, since B is related to his sister in the first degree of consanguinity, A is related to B in the first degree of affinity.

A. The Hebrew Law.

§ 1. The idea of the physical, moral, and spiritual unity of a man and his wife finds strong expression in the earliest pages of Hebrew literature. Gen. ii: 23, 24: And Adam said, this is now bone of my bone and flesh of my flesh. * * * Therefore shall a man leave his father and mother and cleave unto his wife, and they twain shall be one flesh.

§ 2. The unity of man and wife implies that the relatives of the one are relatives of the other; and hence, if the marriage of persons nearly related in blood had been abhorrent to the mind of the patriarchs, we should expect to find in them an equal aversion to the marriage of persons nearly related by affinity. But we have seen that marriages which would now be called incestuous on the ground of consanguinity, were freely practised in the patriarchal age, and that marriage with kindred was the rule. Hence, we cannot look to that age for condemnation of any marriage on account of affinity. In the patriarchal age there is none to be found.

§ 3. The only apparent exception is the complaint of Jacob against Reuben, Gen. xlix: 4: "Unstable as water, thou shall not excel; because thou wentest up to thy father's bed, then defiledst thou it; he went up to my couch." The offence of Reuben is related in Gen. xxxv: 22: "It came to pass that when Israel dwelt in that land that Reuben went and lay with Bilhah, his father's concubine, and Israel heard it." From verse 25, of the same chapter, we learn that Bilhah was the mother of Reuben's brothers Dan and Naphtali. In the circumstances of this case the offence and its peculiar aggravations sufficiently account for Jacob's life-long indignation, without supposing the thought of incest to have been present to the mind of the patriarch. The corruption of a concubine by any person is an unpardonable offence at the East, and wherever polygamy prevails; such an offence committed by a son against his father was a double injury; and its enormity was further aggravated by the fact that Bilhah had borne and might yet bear children to his father; but there is nothing to indicate that Reuben would have been considered guilty of crime if he had married Bilhah after his father's death.

§ 4. It is true that Judah, who had been ensnared into fornication with his son's widow (Gen. xxxviii), "knew her again no more" after he had discovered the fraud; but it may be doubted whether that fact is not recorded as an extraordinary circumstance, rather than as an act of obedience to any existing rule.

§ 5. On the other hand the marriage of Jacob with the two sisters, Leah and Rachel (Gen. xxix: 21–30) was regarded as perfectly unobjectionable.

§ 6. In the law of Moses, where we first find the impediment of consanguinity, we also first meet with the impediment of affinity.

§ 7. The Mosaic reason for the latter impediment is the absolute unity of man and wife as stated in Gen. ii: 24: "They twain shall be one flesh." It follows (Lev. xviii: 8, 16) that the nakedness of the one is the nakedness of the other, and that the wife of a near kinsman *e.g.*, of an uncle (Lev. xviii: 14), is a kinswoman in the same degree, (*i.e.*, an aunt).

§ 8. The following marriages are prohibited by the law of Moses on the ground of affinity: —

a. With a mother-in-law. Lev. xviii: 17, xx: 14; Deut. xxvii: 23.

b. With a stepmother. Lev. xviii: 8, xx: 11; Deut. xxi: 30.

c. With a daughter-in-law. Lev. xviii: 15, xx: 12.

d. With a stepdaughter. Lev. xviii: 17.

e. With a brother's wife. Lev. xviii: 16, xx: 21 (but see below, of the Levirate).

f. With a "wife to her sister." Lev. xviii: 18 (but of this see below.)

g. With a step-granddaughter. Lev. xviii: 17.

h. With an uncle's wife. Lev. xviii: 14, xx: 20.

§ 9. If we compare these prohibitions with the Mosaic prohibitions on the ground of consanguinity, we should find that they are exactly parallel, if it were not that there is a peculiar exception regarding marriage with a deceased brother's wife, and in the law which prohibits marriage with a wife's sister.

§ 10. *The law of the Levirate* is so called from the Latin *levir*, a brother-in-law, and prevailed among many oriental tribes which permitted, and indeed required, a surviving brother to marry the wife of his deceased brother. Among the Hebrews it existed in in the patriarchal age, as we learn from the story contained in Gen. xxxviii., as follows: Er, the eldest son of Judah, died without issue, and "Judah said unto Onan (his second son), go in unto thy brother's wife and marry her, and raise up seed unto thy brother." By the death of Er, Onan had succeeded to the birthright of Er, the first born; but any son who might be born to him in marriage with Tamar, the widow of Er, would be regarded as the son of Er, and would be the lineal heir of the birthright. Hence he would take precedence of Onan's own children; and on reaching manhood, he would be the tribal superior of Onan himself. In obedience to his father, Onan married Tamar; but, by a filthy device, avoided having issue by her; and the Lord slew him for his wickedness. Tamar was then sent home to her father's house to wait until Shelah, Judah's youngest and only remaining son, should be old enough to perform the duty of surviving brother, by marrying her and raising up seed to Er, his brother. When Shelah had grown up, Judah, fearing to lose him as he had already lost Onan, did not marry him to Tamar as the law of Levirate required; and this was so great an offence that it was held to justify Tamar in ensnaring Judah himself into an illicit intercourse with her, by which she became pregnant. Judah said, "She hath been more righte-

ous than I, because that I gave her not to Shelah, my son."

§ 11. By the law of Moses the far more ancient law of the Levirate was sanctioned and regulated (Deut. xxv:5–10) as follows: "If brethren dwell together (*i.e.*, in the same house or on contiguous lands), and one of them die, and have no child, the wife of the dead shall not marry unto a stranger; her husband's brother (or *next kinsman*, see Ruth iii:9, 12) shall go in unto her, and take her to him to wife, and perform the duty of a husband's brother unto her. And it shall be that the first born which she beareth shall succeed in the name of his brother which is dead, that his name be not put out of Israel." The next kinsman, however, might refuse to marry the woman (verses 7, 8), but only by submitting to public disgrace (verses 9, 10); and in that case a remoter kinsman *might* take the widow and fulfil the purpose of the Levirate law (Ruth iii:13).

§ 12. Thus the Mosaic law of the Levirate restricted its obligation to the single case of a brother dying childless; even then, to make the obligation effectual, the brothers must have been dwelling together, either in one house, or on contiguous lands, though the story of Boaz and Ruth would imply only that their inherited lands must be contiguous; and at last the survivor might repudiate the obligation altogether, though only at the cost of personal humiliation.

§ 13. With the single exception created by the law of the Levirate, the Mosaic prohibition of marriage with a deceased brother's wife was absolute and peremptory.

§ 14. *The law of marriage with a wife's sister* is expressed in these words (Lev. xviii:18): "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, besides the other in her lifetime."

§ 15. From the last words, "in her lifetime," which limit the whole prohibition, it is evident that the lawgiver intended no reference to marriage with the sister of a *deceased* wife; unless his meaning was that while it should not be lawful to marry his wife's sister while the wife lived, he might marry her after the wife died. Understood in the latter sense, this law would almost expressly sanction marriage with the sister of a deceased wife.

§ 16. The words translated, "a wife to her sister," are rendered in the margin of the Authorized Version by the words "one wife to another," which are admitted to be equally correct. So rendered, the law has no reference whatever to marriage with a wife's sister, but is a distinct prohibition of polygamy. To this rendering there are two objections. The first is that since this prohibition comes at the end of a series of other prohibitions of incest, in which the word *sister* bears its ordinary meaning, it is reasonable to suppose that it bears the same meaning in the disputed passage. The second objection is that polygamy is expressly recognized and sanctioned in other parts of the law of Moses (see Exod. xxi:7–11, and Deut. xxi:15–17; also Deut. xvii:17); and hence the marginal reading would make the prohibition inconsistent with the rest of the law. In answer to this second objection it is

said that the passage in dispute may be understood merely as a counsel against polygamy, and not as an absolute prohibition of it; but it is not probable that a gentle counsel should be introduced into the midst of a series of absolute prohibitions of abominable crimes. Everything considered, the marginal reading, though grammatically as admissible as that in the text, does not seem to convey the meaning of the law-giver.

§ 17. A special emphasis on the words "to vex her," would make them the cardinal words of the prohibition, which would then mean merely this: that a man might marry his wife's sister, even in the wife's lifetime, if he liked, but that he must not do it without his wife's consent, If this is the true meaning, it is clear that marriage with a deceased wife's sister is expressly allowed.

§ 18. From what has been said it appears that in the single verse which at all bears upon the subject, marriage with the sister of a deceased wife is either expressly allowed, implicitly sanctioned, or not referred to. In any case it is not prohibited.

§ 19. It remains to inquire whether the list of prohibitions of marriage for the cause of affinity, was intended to be exhaustive. It certainly seems to have been so. In Deut. iv: 2, we read: "Ye shall not add unto the word which I command you, neither shall ye diminish aught from it, that ye may keep the commandments of the Lord your God which I command you;" and in Deut. xii: 32, we read: "What thing soever I command you, observe to do it; thou shalt not add thereto, nor diminish from it." If these

words do not apply to the Mosaic laws of marriage, it is difficult to imagine to what they could apply. So far, however, as marriage with a wife's sister is concerned, it cannot be said to be ignored in the Mosaic Law; and if the law concerning it is compared with the laws concerning the corresponding marriage with a husband's brother, the comparison amounts to a contrast, thus: —

Marriage with a husband's brother:

Lev. xviii: 16. Thou shalt not uncover the nakedness of thy brother's wife; it is thy brother's nakedness.

Lev. xx: 21. If a man shall take his brother's wife, it is an unclean thing; he hath uncovered his brother's nakedness; they shall be childless.

Marriage with a wife's sister:

Lev. xviii: 18. Neither shalt thou take a wife to her sister to vex her, to uncover her nakedness, besides the other in her lifetime.

B. The Roman Law.

§ 1. The ancient law of Rome is briefly given in the Institutes of Gaius.

Gai. Inst. I, § 63. It is not lawful to marry a woman who was once one's mother-in-law, or daughter-in-law, or his step-daughter, or step-mother; and the words *was once* are used because, if the marriage which created the affinity were still existing we could not marry a woman who would be the wife of another man.

§ 2. It will be observed that marriage with a deceased wife's sister and a deceased brother's wife are not included in the prohibition.

§ 3. The Institutes of Justinian, after repeating the prohibitions of Gaius, add the following: —

Justin. Inst. I, 10, 8. But the son of a husband by a former wife, and the daughter of his wife by a former husband (or *vice versa*), may rightly marry, though they may have a brother or sister born of the marriage of their parents.

9. If your wife after divorce gives birth to a daughter by another man, the child is not your step-child; nevertheless Julian thinks that a marriage with her ought not to be contracted; and, in like manner, though the betrothed wife of your son is not your daughter-in-law, and the betrothed wife of a father is not the step-mother of his son, yet they who avoid marriages with such persons will do well.

§ 4. It was through the observance of such distinctions that the ecclesiastical impediment of public decency (*Honestas*) afterwards became so formidable.

C. The Law of the New Testament.

The New Testament makes no change in the Mosaic laws on the subject of affinity, but incidently confirms it in two particulars.

a. John Baptist was imprisoned, and at last put to death, for boldly declaring to Herod that his marriage with Herodias was unlawful.

Mark vi: 17, 18. Herod himself had sent forth and laid hold upon John, and bound him in prison for Herodias' sake, his brother Philip's wife; for he had married her. For John had said unto Herod, It is not lawful for thee to have thy brother's wife.

b. St. Paul refers to a case of scandal in the church at Corinth.

1 Cor. v: 1. It is reported commonly that there is fornication among you, and such fornication as is not so much as named among the Gentiles, that one should have his father's wife.

D. Canons of Councils, Decrees of Popes, and Judgments of Fathers.

26. Ap. can. 19. He who has married two sisters or a niece cannot be a clergyman.

27. *Conc. Eliber.* (A. D. 305), c. 61. If any man, after his wife's death shall marry her sister, she too being a Christian, it is decreed that they abstain for five years from communion, unless some necessity of sickness require that the peace be sooner given.

28. c. 66. If any man shall marry his step-daughter, because he is guilty of incest it is decreed that he shall not receive communion even in the hour of death.

29. *Conc. Neo-Cæsar.* (A. D. 314–323), c. 2. If a woman shall have married two brothers, let her be cast out until her death, nevertheless, at the hour of death she shall be received to penance, provided she declare that she will break the marriage if she should recover. But if the woman or her husband die in such a marriage, the penance of the survivor shall be severe.

30. *S. Basil.* (A. D. 370), c. 23. No man ought to marry two sisters, and no woman ought to marry two brothers. He who marries his brother's wife is not to be received until he has put her away.

31. c. 78. He who successively marries two sisters is to be received only after submitting to the penance of an adulterer (seven years) if he repent with tears.

32. c. 79. The same penance is prescribed for one who marries his mother-in-law.

33. c. 77, 78. Contain the preface to a letter to Diodorus, Bishop of Tarsus, and the letter itself. In the former Basil tells Diodorus that a letter bearing his signature has been shown in which he is said to have justified a man's marriage with a deceased wife's sister; but Basil hopes that the document is spurious. In the letter itself he argues strongly against such marriages.

34. *Conc. Roman.* (A. D. 416), sub Innocent. I., Papa. cc. 9, 11. No Christian may marry his deceased wife's sister, nor besides his wife have a concubine; and it is not lawful to marry an uncle's wife, or his son (*ie.* a cousin-german).

35. *Conc. Agath.* (A. D. 506), c. 61. No indulgence is henceforth to be shown to persons guilty of incestuous marriages, unless they shall atone for their guilt by separation. These marriages are declared to be incestuous: — with a brother's widow; with a step-mother; with a cousin-german; with the widow or daughter of a maternal uncle; or with the daughter of a paternal uncle; or with a step-daughter; or any woman of his kindred, or whom he has had as a kinswoman (*i.e.* by a former marriage). But the parties separated by the operation of this canon are permitted to contract other lawful marriages.

36. *Conc. Aurelian. I.* (A. D. 511), c. 18. A surviving brother shall not ascend the bed of his brother deceased; neither shall any one dare to join himself to the sister of his deceased wife.

37. *Conc. Epaon.* (A. D. 517), c. 30. Repeats the 61st canon of Agde.

38. *Conc. Aurelian.* II. (A. D. 533), c. 10. No man shall be joined in any kind of copulation with his step-mother, that is to say, his father's wife; and if he shall pre-

sume so to do, let him know that he shall be punished with anathema.

39. *Conc. Arvern.* (A. D. 533), c. 12. Repeats the legislation of the councils of Agde and Epaune.

40. *Conc. Aurelian.* III. (A. D. 538), c. 10. Concerning incestuous unions let the statutes be observed; so that they who are now just coming to baptism, or to whom the statutes of the fathers have not been made known by priestly instruction, (so we think it right to take account of the recent date of their faith and conversion), shall not be required to dissolve marriages of this kind heretofore contracted; but for the future let that which is forbidden in the earlier canons of incestuous marriages be observed. That is to say, let no man, under the name of marriage, presume to take his father's widow, or the daughter of his wife, or the widow of his brother, or the sister of his wife, his cousin-german on either side, or the widow of his uncle on either side. But if any shall be united in such incestuous adultery rather than marriage, until they separate from each other let them be repelled from the communion of the church. This also we think meet to add, that it shall be left to the decision of the bishop whether particular persons within his See and territory, who are united in any such way, have entered into their unlawful marriages ignorantly, or whether they have contumaciously done what they knew to be forbidden; for we would help those who have fallen through ignorance; but in the case of those who had knowledge of the statutes of the fathers, and who have engaged in such commixtures even in defiance of the remonstrances of their priests, we require that the provisions of the former canons be in all respects observed; so that such persons be not received to communion until they have healed their incestuous adultery (so it is written) by forsaking it. For in the law

of the Lord we plainly read: Cursed is he who lieth with his father's wife; or with his step-daughter; or the sister of his wife, and other the like. Wherefore whom God hath cursed, them, unless they amend, we cannot bless.

41. *Conc. Turon.* (A. D. 567), c. 21. Recites the prohibitions of Lev. xviii; adds a prohibition of marriage with a deceased wife's sister, a niece or a cousin, and confirms the earlier canons of Orleans, Epaune, and Auvergne.

42. *Conc. Antisiod.* (A. D. 578), c. 27. Forbids marriage with step-mother, step-daughter, brother's widow, wife's sister, cousin, uncle's widow.

43. *Greg. I. Papa.* (A. D. 597-604), Epist. ad August. Cant. Ep. (Apud Bedam, lib. 1, c. 27). In answer to a question of St. Augustine "whether two brothers may marry two sisters of a family far remote from them," Gregory answers: This may lawfully be done; for nothing is found in Holy Writ that seems to forbid it.

44. In answer to the question "whether a man may marry his step-mother or other relative by affinity?" Gregory answers: — To marry a step-mother is a grievous crime, because it is written in the law, "Thou shalt not uncover the nakedness of thy father." Now, the son cannot uncover his father's nakedness, but it is also written "They twain shall be one flesh," and he who presumes to uncover the nakedness of his step-mother, who has been made one flesh with his father, does undoubtedly uncover his father's nakedness.

45. *Idem.* In like manner it is forbidden to marry a brother's wife, because by her former union she is become the brother's flesh. For the testimony of this thing John Baptist was beheaded and ended his life in holy martyrdom. * * * But forasmuch as there are many of the English, who are said to have been joined in this execrable marriage while

they were still in infidelity, when they come to the faith they are to be admonished to abstain from it, and they must be taught that its a grievous sin. * * * Nevertheless they must not be deprived of the communion of the body and blood of Christ on account of it, lest they seem to be punished for things done in ignorance before their baptism. For the present the church chastises some through zeal, and tolerates some through meekness, and connives at some things through discretion, so that by this forbearance and connivance she may often suppress an evil which she condemns. They, however, who come to the faith are admonished not to do such things, and if they do them they are to be excluded from the communion of the body and blood of Christ. For as the offence is in some degree to be tolerated in those who fell into it through ignorance, so it is to be strenuously prosecuted in those who presume to sin knowingly.

46. *Conc. Paris. V*, (A. D. 615), c. 14. Renews the legislation of Orleans, Epaune, Auvergne, Auxerre.

47. *Julius II, Papa*, (A. D. 682, 683), (in Theodori Cantuar. Ep. Poen. c. 11). This also is decreed, that no man may marry his brother's widow, his stepson's widow, nor the widow of any kinsman of his wife to the third generation. The law of marriage with a wife's kindred is the same as with one's own.

48. *Conc. in Trullo*, (A. D. 691), c. 54. We decree that he who has the companionship of marriage with his brother's daughter, or a father and son with mother and daughter, or a father and son with two sisters, or a mother and daughter with two brothers, or two brothers with two sisters, shall be subjected to the rule of seven years penance after they have publicly withdrawn from their nefarious concubinage.

49. *Conc. Roman. sub Greg. II, Papa*, (A. D. 721).

Forbids marriage with a nun, a commater, a brother's wife, a niece, a step-mother, a step-daughter, a cousin, or any relative, whether by blood or affinity.

50. *Conc. Vermer.* (A. D. 753), c. 2. If a man shall commit sin with his step-daughter, he shall not afterwards have carnal knowledge either of her or her mother, nor shall he or the stepdaughter be able to contract marriage with any person or at any time whatsoever. But if the wife, having no carnal communication with her husband, and knowing that he has committed adultery with her daughter, shall not be able to contain, or will not voluntarily abstain, she may marry.

51. *Conc. Compend.* (A. D. 756), c. 2. If two persons, male or female, are related to each other in the third degree, or one in the third and the other in the fourth, when one of them dies it is not lawful for the other to take his wife, and persons discovered to have done so shall be separated.

52. *Conc. Mogunt.* (A. D. 813), c. 56. If any man who has married a widow has afterwards committed fornication with her daughter, or if he has married two sisters, or if a woman has married a father and his son, we command that such unions be anathematized and broken up, and that the parties shall not marry again but shall be severely punished.

53. *Conc. Tribur.* (A. D. 895), c. 41. A man espoused a wife and he gave her a dowry, but was not able to have marital connection with her; the woman was seduced and became pregnant by his brother. In this case it was decreed that although the woman could have no conjugal connection with her lawful husband, the brother could not marry a woman who had been betrothed to his brother; nevertheless the parties might engage in other lawful marriages.

54. *Conc Bitur.* (A. D. 1031), c. 18. No man shall marry the wife of any kinsman whatsoever

55. *Conc. Lateran. IV*, (A. D. 1215), c. 50. It is not to be considered reprehensible that the statutes of men should be changed with the change of times, especially when manifest expediency and urgent necessity so require, since God himself in the New Testament has changed many statutes which he had established in the Old. And whereas the prohibition of marriage between persons related to each other in the second and third degrees (*genus*) of affinity, and the prohibition of marriage between the children borne by a woman in a second marriage with any kinsman of her first husband, have occasioned many difficulties and have sometimes imperilled men's salvation, now therefore, with the approval of this holy Synod, we revoke all previous constitutions on this subject, and by this present constitution we decree that all who contract such marriages may freely cohabit; and furthermore, the prohibition of marriage shall not for the future extend beyond the fourth degree whether by affinity or consanguinity; since beyond that degree it is not possible that such a rule should be observed. But forasmuch as the prohibition of marriage is now restricted to the fourth degree, we will that it be henceforth perpetual, any previous constitution of others, or of ourselves, to the contrary notwithstanding.

56. *Decretals of Gregory IX*, (A. D. 1230), IV. 12. There can be no marriage between a man and the adopted daughter of his father so long as the adoption lasts. [Nicolaus I, A. D. 855–867.]

57. IV. 13; 1. Affinity occurring after a marriage has been contracted does not dissolve the marriage, though it prohibits conjugal intercourse; and an incestuous person may not marry. But see below, IV. 13; 4. [Conc. Vermer. A. D. 753.]

58. IV. 13; 2. Affinity occurring by means of illicit

intercourse dissolves a betrothal, but not a marriage, and an incestuous person cannot contract marriage. But see below, IV. 13; 4. [Alexander III, A. D. 1159–1181.]

59. IV, 13; 4. An incestuous person ought not to contract any marriage, but if he does the marriage holds; in such manner, however, that the guilty party is bound to pay, but cannot demand, the conjugal debt; and such a husband is nevertheless bound to support his wife. [Celestine III, A. D. 1191–1198.]

60. IV. 13; 6. Affinity following an unconsummated marriage does not dissolve the marriage. [Innocent III, A. D. 1198–1216.]

61. IV. 13; 8, 9. Affinity occurring by illicit intercourse breaks a betrothal and disqualifies the guilty parties for contracting marriage. [Idem.]

62. IV. 13; 10, 11. Affinity following a marriage does not dissolve the marriage. [Idem and Gregory IX, A. D. 1227–1241.]

63. IV. 14; 1. Marriage contracted between persons related by affinity in the fourth generation of the first degree is void. [Alexander III.]

64. IV. 14, 4. Unbelievers married within prohibited degrees are not separated after baptism. [Celestine III.]

65. IV. 14; 5. The blood relations of a man may freely intermarry with the blood relations of his wife. [Innocent III.]

66. IV. 14, 8. The prohibition of marriage in the second and third degree of affinity is abolished. In like manner, the prohibition is abolished which forbade the children of a woman by a second marriage to intermarry with the kindred of her first husband, and the prohibition of marriage between persons related by consanguinity or affinity is confined to the fourth degree. [*Idem.*]

67. IV. 19, 8. Pagans who are married in a degree prohibited by canon law only are not to be separated, if they are converted to the faith. [*Idem.*]

68. *Conc. Trid.* (A. D. 1563), Sess. xxiv. De Reform. Matr. c. 4. The holy synod, for the aforesaid and other weighty reasons restricts the prohibitive and dirimant impediment of affinity, when caused by fornication, to those only who are related in the first and second degree, and decrees that in the further degrees affinity of that sort shall not void a marriage actually contracted.

Notes on the Canons, etc.

§ 1. Affinity being a relationship with the blood relations of a wife or husband, degrees of affinity are reckoned in the same way as degrees of consanguinity; thus, if A and B. are husband and wife, and if C is related to A in any degree of consanguinity, he is related to B in the same degree of affinity. In other words, affinity might be loosely said to be created by consanguinity.

§ 2. But in the middle age affinity was, in a perfectly strict sense, held to be created not only by consanguinity, but by affinity also; since a man (or woman) was held to be related not only to the blood relations of his wife (or husband), but also to her (or his) relatives by affinity; and affinity of this sort was an impediment of marriage equally with the other. Thus, if A and B are brothers, and C is the wife of B, she is related to A in the first degree of affinity, and there our reckoning stops; but the mediæval reckoning went far beyond this; for if B died, and C afterwards married D, D was then related to A in the second degree

of affinity; and if C died next, and her husband married E, E was related to A in the third degree of affinity. Thus, if D died in his turn, the marriage of A and E would be hindered by a dirimant impediment of affinity. That is to say, A was absolutely forbidden to marry the widow of a man who had previously married the widow of A's brother. The same rule applied in all directions; for the children of A, being in the second degree of affinity with C, could not marry either D, or his widow, or his children.

§ 3. By abolishing all degrees of affinity created by affinity, the Fourth Lateran Council removed all these confusions. The effect of the fiftieth canon of that council was simply this: that the husband's relatives by blood, and those only, were to be regarded as the wife's relations by affinity, and *vice versa;* and marriage was prohibited between relatives of either class in or within the fourth degree.

§ 4. The Council of Trent further restricted the impediment of affinity, occurring through illicit intercourse, to the second degree. (See 68.)

SCHOLIA.

1. In the canons the following marriages are expressly prohibited: —

a. With a stepmother. 16, 35, 37, 38, 40, 41, 42, 44, 46, 49, 52.

b. With a mother-in-law. 10, 16, 32, 305, 314.

c. With a stepdaughter. 28, 35, 37, 39, 40, 41, 42, 46, 49, 50, 305, 308, 314.

d. With a daughter-in-law. 1.

e. With stepson's widow. 47.

f. With an uncle's widow. 2, 35, 37, 39, 40, 41, 42, 46.

g. With a brother's widow. 10, 16, 29, 30, 35, 36, 37, 40, 41, 42, 45, 46, 47, 49, 311.

h. With a deceased wife's sister. 4, 26, 27, 30, 31, 33, 34, 36, 40, 41, 42, 46, 52, 308, 309, 315, 318, 320, 322.

i. With a wife's niece. 20.

2. General regulations:—

a. Marriage is forbidden with a wife's kindred to the third generation. 47, 51.

b. With the widow of any kinsman to the fourth generation. 55, 56.

c. Universally with any relative by affinity. 16, 20, 35, 37, 39, 49, 59.

3. We observe also that

a. Adoption is recognized as in the Roman law, so as to forbid marriage with an adoptive sister. 56.

b. And that a distinction is recognized between impediments that are merely canonical, and those that are of divine authority. 67.

c. A curious contradiction is found between Gregory the Great who sanctioned the marriage of two brothers with two sisters, and the law of the Greek church as expressed by the Council *in Trullo*, which not only forbade it but also forbade the marriage of a mother and daughter with two brothers, and of a father and son with a mother and daughter. See 43 and 48.

d. The ruling of Gregory I was equally set aside by Gregory II, and by the general mediæval notion that affinity is created by affinity; but it is now the universal rule of western Christendom.

No attempt has been made to classify the provisions of *the Decretals.*

E. Anglican Reformation.

§ 1. By 25 Henry VIII, cap. 22 (A. D. 1533), the marriages prohibited by God's laws were declared to be these: —

The son with mother or stepmother;

Brother with sister;

Father with son's daughter or daughter's daughter;

Son with father's daughter born and procreate by his stepmother;

Son with his aunt on either side;

Son with his uncle's wife;

Father with son's wife;

Brother with brother's wife.

Any man with his wife's daughter or wife's son's daughter or wife's daughter's daughter or wife's sister.

§ 2. Marriage within these degrees was prohibited; the separation of such marriages already effected was declared to be good, lawful, firm, and permanent forever, and issue therefrom was pronounced to be illegitimate; but for the future separations under this act might be decreed only by the ecclesiastical courts of the realm, and their sentence should be final.

§ 3. By 28 Henry VIII, cap. 7 (A. D. 1536), the previous statute was repealed, and the prohibited degrees were stated as follows: —

The son with mother or stepmother, carnally known by his father;

Brother with sister;

Father with son's daughter or daughter's daughter;

Son with father's daughter procreate and born by his step mother;

Son with aunt on either side;

Son with uncle's wife carnally known by his uncle.

Father with son's wife carnally known by his son;

Brother with brother's wife, carnally known by his brother;

Any man married and carnally knowing his wife, with his wife's daughter or his wife's son's daughter or his wife's daughter's daughter, or his wife's sister.

§ 4. Carnal knowledge of a man's wife was thus made necessary to create affinity with her kindred, and thus many of the artificial impediments created by the Decretals, under the head of Public Decency, were summarily abolished.

§ 5. But it was enacted that "if it chanced any man to know carnally any woman" (*i.e.* by illicit intercourse), the impediment of affinity should forbid his marriage with any of her kindred as in the case of a lawfully consummated marriage. The rest of the act confirmed the provisions of 25 Henry VIII, cap. 22, as above given.

§ 6. By 32 Henry VIII, cap. 38 (A. D. 1541), all prohibitions of marriage on the ground either of consanguinity or of affinity, except those of God's law, are abolished; the marriage of cousins-german is expressly declared to be lawful; and no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees.

§ 7. *Canons of 1603*, c. xcix. None to marry within the degrees prohibited. No person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year

of our Lord God, 1563, and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning; and the parties so married shall by course of law be separated, and the aforesaid table shall be in every church publicly set up and fixed at the charge of the parish.[1]

§ 8. The Table to which reference is made in the preceding canon was published under Elizabeth in 1563; and, like other canons and constitutions of that reign, it was confirmed only during the life of the queen. This was one reason of the necessity of setting forth the canons of 1603, which are mainly a re-enactment of previous injunctions and canons, immediately after the accession of James I. The Table is given opposite the title page.

§ 9. The Table of 1563, 1603, was intended to be in principle identical with the Levitical Law, though

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[1] As there has been much doubt in this country of the validity of the canons of 1603, it may be well to insert here the following extract from Gibson's Codex, p. 995: —

"In the 30th of Charles II consultation was in the King's Bench against one who taught school without license in contempt of the canons, and the reason given by the court was 'That the canons made in the time of King James I, and by him confirmed, are *good* by the statute 25 H. 8, so long as they do not impugn the Common Law or the Prerogative Royal.' And, by Vaughn (327) upon the canon which relates to the degrees of marriage, it is said as follows: 'If, by a *lawful canon*, a marriage be declared to be against God's law we must admit it to be so; for a lawful canon is the law of the kingdom as well as an act of Parliament; and, whatever is the law of the kingdom is as much the law as anything else that is so; for, what is law doth not *suscipere majis aut minus*.'"

in the number of prohibitions it went far beyond the specific enactments of the law of Moses. The principle on which the Table is formed is well stated by Gibson (Codex pp. 498, 499), as given below. I have taken such liberty with the author as to give an English version, instead of the Latin text of his quotations from the *Reformatio Legum* and the Canons of 1571.

The e are several Degrees, which, altho' not expressly named in the Levitical Law, are yet prohibited by that, and by this Act, paritate Rationis. Which is well expressed and illustrated in the *Reformatio Legum:*

In the chapters of Leviticus, it is observed that the persons lawfully forbidden to marry are not set forth by name. For the Holy Spirit has evidently put there those persons through whom all other like degrees of relationship may be easily discovered; for example, when we see that a mother cannot be her son's wife, it follows that a daughter cannot be her father's wife; and if it is not lawful to take the wife of a father's brother, neither, certainly, can it be lawful to marry the wife of a mother's brother.

To which the same Book adds two particular Rules, for our direction in this matter:

1. That whatever places are assigned (in the Levitical prohibitions) to men, we must understand to be assigned to women in like degrees of relationship and propinquity. 2. That man and wife are to be held as being together one flesh, so that in whatsoever degree of consanguinity the man is related to any other person, the wife is related to that person in the same degree of affinity; and the same rule holds contrawise (of the husband's affinity to the kindred of the wife).

Upon the foregoing rule, from *Parity of Reason* (which we also find to be acknowledged, and laid down, by the Books of *Common-Law*) rests the Prohibition against marrying a *Wife's Sister;* which I cannot better explain, than in

the words of Bishop *Jewel*, in his printed Letter upon that point: "Albeit, I be not forbidden, by *plain words*, to "marry my Wife's Sister, yet am I forbidden so to do by "other words, which by Exposition are plain enough. For "when God commands me, I shall not marry my Brother's "Wife, it follows directly by the same, that he forbids me "to marry my Wife's Sister. For between one Man and "two Sisters, and one Woman and two Brothers, is like "Analogy or Proportion" Accordingly, in the Canons of 1571, where the Dissolution of all Marriages within the Levitical Degrees is directed, this Case is specially enforced:—

Chiefly, however, if any man, after the death of a former wife, have married her sister; for by the common consent and judgment of learned men, this degree is held to be prohibited in Leviticus. And when this point of Marrying the Wife's Sister, came under consideration in the King's-Bench (25 *Car. Michaelmas-term 2. Hill* v. *Good*) tho' it was alleged, that the precept *prima facie*, seemed to be only against having two Sisters *at the same time*, and Prohibition to the Spiritual Court was granted; yet in *Trinity-term*, 26 *Car.* 2. after hearing Civilians, they granted a Consultation, as in a matter within this Statute 32 *H.* 8; though the former Statute (28 *H.* 8.) had never been revived, after the Repeal of of Queen *Mary* which yet it *virtually* was; and there, as in 25 *H.* 8., the Wife's Sister is *expressly* prohibited.

Upon the like *Parity of Reason*, in the Case of *Wortly* and *Watkinson*, a Consultation was granted, where one had married the Daughter of the Sister of his former Wife; which (as Sir *John King* laid the Argument) is in the same degree of Proximity, as the Nephew's marrying his Father's Brother's Wife; and this being expressly prohibited, the other, *paritate rationis*, is so too; as it had been declared (16 *Jac.* 1.) in *Rennington's* Case before the High Commissioners. Which point was again argued 1 *Annæ*, in the Case of *Snow-*

ling and *Nursey*, and Consultation granted as before; notwithstanding the Case of *Richard Parsons*, mentioned by my Lord *Coke*, in which it was first determined, not to be within the Levitical Degrees, and Prohibition granted; but a Consultation being awarded on Debate two years after, that Case is said to have been expunged out of the first Institute, by Order of King and Council. I will only add, that this was the very Point, in which (presently after making of the Act) *Cromwell* desired a Dispensation for one *Massey*, who was contracted to the Sister's Daughter of his late Wife; but the Archbishop denied it, as contrary to the Law of God, and gave for reason, That, as several persons are prohibited, which are not *expressed*, but *understood*, by like Prohibition, in equal degree; so, in this case, it being expressed, that the Nephew shall not marry his Uncle's Wife, it is implied, that the Niece shall not be married to the Aunt's Husband.

Much less can it be doubted, whether the like rule, *de paritate Rationis*, doth not forbid the Uncle to marry his Niece, which, tho' not expressly forbidden, is *virtually* prohibited in the Precept, that forbids the Nephew to marry the Aunt; nor is it of moment to alledge, that the first is a more favourable Case, as the *natural Superiority* is preserved; since the *Parity of Degree* (which is the proper rule of judging) is the very same.

But where the Case in the Spiritual Court was, that one had married the Wife of his great Uncle, this was declared, not to be within the Levitical Degrees; and accordingly (after the Opinion of all the Judges, taken by the King's special Command) a Prohibition was granted. This was the Case of *Harrison* and *Barwell* (20 *Car.* 2.) very particularly reported by *Vaughan* and *Ventris*; in which Reports (together with that of *Hill* and *Good*, which is likewise set forth at large by *Vaughan*) may be found a Variety of Learning and Argument, upon this point of *Levitical Degrees;* the *Results* of which are here set down.

There are two Rules in the *Reformatio Legum*, which conduce much to the true understanding of the Levitical Degrees:

1. Not only does the order here set forth obtain in lawful marriages, but the same holds good of illicit conjunctions; for, as the son cannot marry his father's wife, so neither can he have his father's concubine; and, as a father may not touch his son's wife, so ought he to keep away from a woman whom his son has abused; and, as a mother cannot lawfully marry her daughter's husband, so neither can she be joined to him who has violated her daughter. 2. Not only are the persons whom we have named to avoid each other while the husbands live, but the law continues in force even after their death; for as it is a horrible crime to violate the wife of a father, or a brother, or an uncle during his lifetime, so, after his death, it is equally shameful to marry her.

To the first of these Rules may be referred the Case of *Haynes* and *Jephcott*, in which a Prohibition was pray'd to the Spiritual Court on a Suit there against a man for marrying his Sister's Bastard daughter, as not within the Levitical Law. But it was urged against the Prohibition, that in this Case, *legitimacy* or *illegitimacy* made no difference, and that if a *Bastard* be not within the Rule, *Ad proximum sanguinis non accedat*, then a Mother may marry her Bastard Son. The Court inclined, not to grant a Prohibition; but the Cause was adjourned, and it appears not what became of it.

VI. SPIRITUAL AFFINITY.

§ 1. Under the head of Affinity, canonists include the relation between a sponsor and the baptized person as well as his kindred, and also between the person who baptizes and the same parties. This relation is distinguished by the name of Spiritual Affinity.

§ 2. No such relation could, of course, exist under

the ancient Jewish Law, nor under the laws of heathen Rome. The idea, nevertheless, was taken from the Roman law of adoption. (See *Consanguinity*.)

§ 3. The origin of sponsorship is lost in antiquity. Adult persons seem always, from the age of the apostles, to have been received after their baptism by persons chosen for each individual from among the faithful. Infants, in like manner, were brought to baptism, and received after it by persons who were expected and required to see to the spiritual nurture of the children as they grew up. Hence a certain parental relation between the sponsor and the godchild was recognized in things pertaining to God. Doubtless the duty implied in sponsorship was then regarded much more seriously than it is now; and hence the tie between sponsor and godchild was much more real than in these days when it is little more than an ecclesiastical fiction. As an impediment to marriage, however, it was not by the church, but by Justinian that the relationship of spiritual affinity was first recognized (A. D. 527). The whole of the decree is given, though part of it is irrelevant, in order to show the original idea out of which so wide a general law of the church was afterwards developed, without any authority of Holy Scripture, or any primitive tradition of the church itself.

Cod. Justin, lib. v. *tit.* 4, *leg.* 26. If a man set free a woman whom he has brought up and afterwards marry her, the ancients doubted whether or not such a marriage were lawful. Therefore, to set the former question at rest, we decree that it is not a forbidden marriage. All marriages are

brought about by affection, and if we find nothing impious or unlawful in such a uuion, why should we think that the marriage ought to be forbidden? No one can be found so impious as to marry a woman who has stood in the relation of a daughter to him; and the man must be believed when he says that from the heginning he did not bring her up as his daughter but afterwards set her free and thought her worthy of marriage. Hence, evidently, a woman is utterly to be forbidden to marry a man who has received her from holy baptism, whether he has brought her up or not, for nothing else can so produce a fatherly affection and a just prohibition of marriage as the tie by which, through the mediation of God, their souls have been united.

§ 4. The doctrine of spiritual affinity as an impediment to marriage, thus enunciated by the emperor in its narrowest sense, does not seem to have been readily adopted by the church. It is nowhere found in ecclesiastical documents until the council in Trullo, A. D. 692, and its first appearance in the West is not earlier than A. D. 721. The idea, however, had by that time so rooted itself that it had begun already to multiply. In the first Eastern canon there is no longer a question of marriage between the sponsor and the child, but between the sponsor and the child's widowed mother; and, in the first Roman canon, we find that a new word, *commater*, had come into use to designate the mother of the child in her relation to the godfather, and perhaps also of a godmother in her relation to the child's father.

§ 5. The course of subsequent church legislation may be traced in the following canons from which it will be seen that the eagerness to devise impediments

to marriage which was exhibited by ecclesiastics for several centuries was not content with the opportunities afforded by consanguinity and affinity, even with the addition of a fanciful spiritual affinity created by baptism, but that it added to these a new mode of contracting spiritual affinity through confirmation. It is probable that the sponsors of a child were usually the persons by whom he was presented for confirmation; but as death or other causes arose to prevent this, other persons who were called in to perform this part of the sponsor's duty, were held to have incurred the same relations of spiritual affinity as the sponsor himself, and at length any person appearing with the child at confirmation became allied to him and his by spiritual affinity.

D. Canons, Decrees, etc.

69. *Conc. in Trullo*, (A. D. 692), c. 53. Notwithstanding that spiritual relationship is greater than bodily conjunction, we have learned that the godfathers of children in holy and saving baptism do afterwards contract marriage with the mothers of such children, being left widows. We have determined that, for the future, no such thing shall be done, but that if any shall do so, they shall first separate from their unlawful marriage and then be subjected to the penance of fornicators.

70. *Conc. Roman.* (A. D. 721), *sub Gregorio II, Papa.* Anathematizes any one who marries a *commater.*

71. *Zachar. Papa* (A. D. 741–752), Ep. vii, c. 22. Forbids marriage of a godfather with the child or the child's mother.

72. *Conc. Roman.* (A. D. 743), *sub Zachar. Papa.* For-

bids marriage with a deaconess, nun, monastic woman, or "even a spiritual *commater.*"

73. *Conc. Metens.* (A. D. 753), c. 1. Forbids marriage "*cum commatre sua, aut matrina spirituali de fonte et confirmatione episcopi,*" that is with a commater, or with one's own godmother, whether in baptism or confirmation.

74. *Conc. Compend.* (A. D. 757), c. 12. If any one has held a stepson or stepdaughter before the bishop for confirmation, he shall be separated from his wife and shall not marry another.

75. *Conc. Mogunt.* (A. D. 813), c. 55. No man shall receive his own child from the font in baptism, nor shall he marry his godchild, nor a commater, nor a woman whose child he has presented for confirmation.

76. *Conc. Cabilon.* (A. D. 813), c. 51. It has been reported to us that some women through carelessness, and some through fraud in order to be separated from their husbands, have held their own children before the bishop for confirmation. Wherefore we think it right that in either case the woman shall be under penance as long as she lives, but she shall not be separated from her husband.

77. *Nicolaus I, Papa* (A. D. 858), *Ep. ad Rudolph. Bitur. Ep.* He who has held his wife's children by a former marriage in confirmation before the bishop, if he did it ignorantly, as you say, has committed a sin and must do penance, but he is not to be separated from his wife.

78. *Idem, Ep. ad Bulgar.* A man ought to love him by whom he was received from the font as if he were a father. Yea, seeing that this is a spiritual patronage and adoption according to God, therefore, so far as the spirit is more excellent than the flesh, so far ought the spiritual father to be loved in all things by his spiritual son. * * * There is between them a free and sacred communion which cannot

be called consanguinity, but which is rather to be called a spiritual kindred (*spiritualis proximitas*). Therefore, we judge that between persons so related there can be no marital union. The venerable laws of Rome forbade marriage to be contracted between parents and their adopted children equally with their children by birth; and if marriage is forbidden between those who are united by adoption, how much more ought they to cease from carnal conjunction whom the regeneration of the Holy Ghost hath joined together by the heavenly sacrament.

79. *Joannis VIII, Papa* (A. D. 872–882), Epist. ad Anselm. Lemovic. Ep. In the case of a man who had baptized his own child at the point of death, the bishop had decided that he must separate from his wife. John reverses the decision, and declares that the man has done right.

80. *Conc. Tribur.* (A. D. 895), c. 47. If any man have a spiritual *compater* whose child he has received from the bath of the sacred font, while the wife of the latter *compater* is not a *commater* of the former, the sponsor may afterwards marry her, if she be left a widow and they be not near of kin. [It would seem that, in the case supposed, the baptized child is the woman's stepchild, or a child of a former marriage baptized before her marriage with the father.]

81. c. 48. If any man have fortuitously and by chance married the daughter of a woman who is his spiritual *commater*, it is our maturer judgment that he keep her, and honorably pay the conjugal debt.

82. *Leo VII, Papa* (A. D. 936–939), Epist ad Germanos. He who marries a spiritual mother and daughter is to be punished.

83. *Paschalis II, Papa* (A. D. 1099–1118), Epist. ad Regin. Ep. There seems to be neither reason nor authority

to forbid a man's marriage with a woman who has been a *commater* with his deceased wife.

84. *Decretals of Gregory IX.* (A. D. 1230), IV. 11; 13. The children of two *compatres*, neither of them being the baptized party, may marry, unless (local) custom forbids. [Alexander III, A. D. 1159-1181.]

85. IV. 11; 2. Compaternity occurring between married persons, whether knowingly or ignorantly, does not dissolve the marriage. [Idem.]

86. IV. 11; 4. Between the father of a child and the widow of the child's godfather marriage is void (*i.e.*, the impediment is *dirimant*). [Clement III, A. D. 1187–1190.]

87. IV. 11; 6. Between the father and the godmother of a child the impediment of spiritual affinity forbids marriage and voids it, if contracted. [Innocent III, A. D. 1198–1217.]

88. IV. 11; 7. If the children of two *compatres*, one of the two children being the person baptized, marry each other, they are to be separated. [Idem.]

89. IV. 11; 8. Between a baptized person and the child of the person by whom he was baptized the impediment of spiritual affinity forbids marriage, and voids it, if contracted. [Gregory IX., A. D. 1227–1241.]

90. *Decretals of Boniface VIII* (A. D. 1298), (commonly called the Sixth Book of Decretals), IV., 3; 1. Spiritual affinity prohibiting marriage and voiding it, if contracted, exists between the baptized person and his sponsor and the sponsor's wife and children known and begotten before the baptism; also between the sponsor and the parents of the baptized; also between the baptizer and the parents of the child. And the same spiritual affinity, prohibiting marriage and voiding it, if contracted, is occasioned in confirmation as in baptism. [Boniface VIII, A. D. 1294–1303.]

91. IV. 3; 3. Though a child ought to have only one sponsor in baptism or confirmation, yet spiritual affinity is formed between all, however many they may be, so as to prohibit marriages, or void them, if contracted. [Idem.]

92. *Conc. Saltzburg.* (A. D. 1420). A pastoral letter from John, Provost and Archdeacon of Salzburg, intended to publish and enforce the decisions of that council, requires parish priests diligently from their pulpits to instruct their parishioners that the following marriages are forbidden: —

a. Between a sponsor or baptizer and the godchild.

b. Between a sponsor or baptizer and godchild's children.

c. Between a sponsor or baptizer and godchild's parents.

d. Between a godchild and the sponsor's or baptizer's children.

e. Between a godchild and the sponsor's or baptizer's husband or wife, carnally known before the baptism.

f. Between a sponsor's or baptizer's husband or wife carnally known before the baptism and the godchild's parents.

93. *Conc. Trident.* Sess. xxiv (A. D. 1563). Decr. de Reform. Matrim. c. 2. Experience teaches that, because of the multitude of prohibitions, marriages are frequently contracted through ignorance in forbidden cases, in which the parties cannot remain together without great sin, and yet the marriages cannot be dissolved without great scandal. Therefore, the holy synod, desiring to provide against this inconvenience, begins with the impediment of spiritual affinity, and enacts that only one man or one woman, or, at most, one man and one woman, shall receive the baptized person after baptism, between whom and the baptized and his father and mother, as also between the baptizer and the baptized and his father and mother only, shall spiritual affinity be contracted. And the parish priest, before baptizing, shall diligently inquire what person or persons have

been chosen to receive the baptized persons from the font, and he shall admit him or them only to that office, and shall enroll their names in a book, and he shall tell them what affinity they have contracted, that they may never be able to excuse themselves by a plea of ignorance. And, if any others than those so designated shall touch the baptized, they shall in no wise contract any spiritual affinity, any constitutions to the contrary notwithstanding. If a parish priest shall do otherwise through negligence, he shall be punished at the discretion of the ordinary. And that affinity which is contracted in confirmation, shall not extend beyond the confirmer and the confirmed, and his father and mother and the sponsor. And all impediments of this spiritual affinity between other persons are hereby utterly abolished.

Note on the Canons, etc.

The first thing to be observed in the foregoing canons is the ambiguity of the words *commater* and *compater*. At first *commater* seems to have meant simply a godmother, or *co-mother* and *compater* a godfather or *co-father*, in relation to the child's parents. Later on as *matrina* and *patrinus* came to be used for godmother and godfather, the former words seem to have become applicable to sponsors in their relation, either to the parents of the child *or to each other*, so that, in the later sense the mother, the godmother, the father, and the godfather of a child were all related to each other as *commatres* and *compatres*.

Scholium.

The impediments created by the canons (not including the insane rule of Salzburg) were these; and it is to be understood that in every case in which a male person is mentioned, the corresponding female person was subjected to a like impediment:

a. A godfather was forbidden to marry

(1) his godchild; 71, 75, 78, 90;
(2) his godchild's mother; 69, 71, 90;
(3) any *commater;* 70, 72, 73, 75; but

b. He might marry his *compater's* widow, not being the child's mother, 80; or a *commater* of his deceased wife, 83; and if he married the child of his *commater*, not knowing her to be such, he might keep her, 81.

c. A father might not marry
(1) his child's godmother, 87;
(2) *any commater*, 70, 72, 73, 75; or
(3) the widow of his child's godfather, 85.

d. A godchild might not marry
(1) his godmother, 73;
(2) his godfather's widow, 90;
(3) his sponsor's daughter, 88;
(4) his baptizer's daughter, 89.

e. The baptizer might not marry the mother of the baptized, 90, and it is probable that a *commater* contracted affinity with the baptizer as well as with the parents of the child.

f. No man might successively marry a godmother and her godchild, 92.

g. The children of *compatres* might marry unless some local custom forbade the marriage, 84.

h. To avoid the creation of a spiritual affinity between persons already married, parents were forbidden to be sponsors for their own children, or even for a stepchild, and if it were done ignorantly it was a sin, but the marriage continued, 77; otherwise it was dissolved, 74; but by the Decretals it was forbidden to be dissolved in either case, 85.

i. The Council of Trent removed the greater part of these fantastic regulations from the canon law of the Roman Church, 93.

E. Anglican Reformation.

By 32 Henry VIII. chap. 38 (A. D. 1541), which declared that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees, the whole impediment of spiritual affinity was summarily abolished.

VII. DISPARITY OF RELIGION.

A. The Hebrew Law

§ 1. It would seem that pride of race, rather than any religious obstacle, created the aversion which prevailed among the patriarchs to the intermarriage of their children with the heathen people by whom they were surrounded. Thus, though Abraham (Gen. xxiv: 2–4) made his servant swear that he would not take for Isaac a wife of the daughters of Canaanites, among whom they dwelt, but of his own kindred and out of his own country, it is very certain that Abraham's kindred were not worshipers of Jehovah (Gen. xxxi: 19, 30). It does not appear that religious sentiment inspired the "grief of mind" with which Isaac and Rebekah beheld the marriage of Esau with the daughters of Heth (Gen. xxxvi: 34, 35; xxxvii: 46); and when Abraham had dismissed his own son Ishmael from his tribe, the marriage of Ishmael with an Egyptian woman (Gen. xxi: 21,) seems to have caused no displeasure. On the other hand the summary demand that the Hivites should submit to circumcision as an indispensable condition of their intermarriage with the family of Jacob (Gen. xxxiv: 13–16), seems to imply that the objection to such intermarriages was of a religious character, to some extent at least.

§ 2. Out of whatever prejudice or principle the obstacle arose, it was often set aside. Simeon, the son of Jacob, had issue by a Canaanitish woman (Gen. xlvi: 10); Manasseh had an Aramite concubine by whom he had issue (1 Chron. vii: 14); Joseph married the daughter of Poti-Pherah, priest or prince of On (Gen. xli: 45); Moses himself, after his flight from Egypt, married the daughter of Jethro, the Midianite (Exod. ii: 21); and at the time of the Exodus, or, more probably, before that time, he had married an Ethiopian woman, to the great scandal of his family (Num. xii: 1). It is to be supposed that during the settlement in Egypt marriages and illicit unions between Egyptians and Hebrews occurred from time to time. One instance of a Hebrew woman being the mother of a child by an Egyptian father is recorded (Lev. xxiv: 10); and it is natural to suppose that marriages between Hebrew men and Egyptian women would frequently occur.

§ 3. From the time when Moses become the lawgiver, all such marriages were stringently prohibited. The old pride of race and the force of national prejudice undoubtedly sustained the prohibition, and facilitated its enforcement; but the reason of the law was distinctly and explicitly religious; and its solemnity was impressed upon the people by its second publication in Deuteronomy, after its first enactment as recorded in Exodus.

Exod. xxxiv: 11-16. Observe thou that which I command thee this day. Behold I drive out before thee the Amorite, and the Canaanite, and the Hittite, and the Periz-

zite, and the Hivite, and the Jebusite. Take heed to thyself, lest thou make a covenant with the inhabitants of the land whither thou goest, lest it be for a snare in the midst of thee. But ye shall destroy their altars, break their images, and cut down their groves (for thou shalt worship no other god, for the Lord, whose name is Jealous, is a jealous God); lest thou make a covenant with the inhabitants of the land, and thou go a-whoring after their gods and do sacrifice unto their gods, and one call thee, and thou eat of his sacrifice; and thou take of their daughters unto thy sons, and their daughters go a-whoring after their gods. Thou shalt make thee no molten gods.

Deut. vii: 1–4. When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, the Hittites, and the Girgashites, and the Amorites, and the Canaanites, and the Perizzites, and the Hivites, and the Jebusites, seven nations greater and mightier than thou, and when the Lord shall deliver them before thee, thou shalt smite them and utterly destroy them; thou shalt make no covenant with them, nor show mercy unto them; neither shalt thou make marriages with them; thy daughter shalt thou not give unto his son, nor his daughter shalt thou take unto thy son, for they will turn away thy son from following me that they may serve other gods; so will the anger of the Lord be kindled against you, and destroy thee suddenly.

§ 4. Even proselytes to the religion of Israel were not to be trusted; and marriage with Moabites and Ammonites was discouraged by degrading such persons to the level of eunuchs and bastards by forbidding them to enter into the congregation of the Lord, and by entailing the same disability on their descendants to the tenth generation. The descendants of an

Edomite, however, who was of kindred blood, and of an Egyptian, because of ancient hospitality and kindness, might enter into the congregation of the Lord in their third generation (Deut. xxiii: 1–8). From the story of Ruth, the Moabitess, who was married by Mahlon during his exile, and who afterwards became the wife of Boaz, it is evident that the descendants of women who adopted the Hebrew religion were subjected to no such disability.

§ 5. As the Israelites did not exterminate nor utterly drive out the former inhabitants of the land, the results which Moses had foretold were realized. It was not only in isolated instances like that of Samson (Judg. xiv: 3) that men of Israel took wives of the heathen. In the days of the judges, when there was no king in Israel, and every man did that which was right in his own eyes, we read (Judg. iii: 5–8) that "the children of Israel dwelt among the Canaanites, Hittites, and Amorites and Perizzites, and Hivites and Jebusites (whom they had not destroyed), and took their daughters to be their wives, and gave their daughters to their sons, and served their gods. And the children of Israel did evil in the sight of the Lord, and forgot the Lord their God, and served Baalim and the groves. Therefore the anger of the Lord was hot against Israel, and he sold them into the hand of Chushan-Rishathaim, King of Mesopotamia, and the children of Israel served Chushan-Rishathaim eight years."

§ 6. Still later we find that Abigail, a sister of David, had a son Amasa by Jether the Ishmaelite (1 Chron. ii: 17), who was probably a proselyte; and, in the reign

of Solomon, we read (1 Kings, vii: 14) that Hiram, the great artificer of the temple, was "a widow's son of the tribe of Naphtali, and his father was a man of Tyre."

§ 7. Of Solomon himself we read (1 Kings, xi: 1–13) that he loved many strange women of the nations concerning which the Lord had said, Ye shall not go in unto them, for surely they will turn away your heart after their gods. Solomon clave unto them in love, and went after Ashtoreth, the goddess of the Zidonians, and Milcom, the abomination of the Ammonites, and built a high place for Chemosh of Moab, and for Molech, the abomination of the Ammonites; and likewise did he for all his wives which burned incense and sacrificed unto their gods. And the Lord was angry, and commanded him concerning this thing, but he kept not that which the Lord commanded. Wherefore the Lord said, I will surely rend the kingdom from thee and give it to thy servant. In thy days I will not do it for David thy father's sake, but I will rend it out of the hands of thy son.

§ 8. Of Ahab also it is recorded (1 Kings, xvi: 30–33) as an aggravation of all his previous misdeeds that, as if it had been a light thing to walk in the sins of Jeroboam, the son of Nebat, he took to wife Jezebel, the daughter of Ethbaal, king of the Zidonians, and forthwith plunged into idolatry, as Solomon had done before him.

§ 9. After the captivity it was found, as might have been expected, that many of the exiles who had returned were married to foreign women (Ezra ix, x).

Even the tribe of Levi, and the sacred lineage of the priests, had been corrupted in this way. A sweeping reform was made, and all who had taken "strange wives" were required to separate from them. The decree was obeyed, and with considerable heartlessness, for it would appear that the children were dismissed with their mothers (1 Esd. ix:36). No question of religion seems to have been raised. It does not seem to have been asked whether the unfortunate women and mothers had conformed, like Ruth, to the national religion. It was enough that they were "strange" women, *i.e.*, of foreign birth, and when they were found to be such, they were ruthlessly dismissed, apparently without pity or reluctance on the part of their husbands.

§ 10. These women and their children formed the "mixed multitude" from which the Israelites of pure blood publicly separated twelve years later, in the time of Nehemiah (Neh. xiii:1–3); but the offence of intermarriage with strange women continued to be committed. Nehemiah discovered Jews (Neh. xiii: 23–28) who had married women of Ashdod, and whose children could not speak the Jew's language, but only a mongrel dialect of both languages. Priests of the highest rank had disobeyed the law, for a grandson of the high priest had married a daughter of Sanballat, the arch-enemy of Israel. Nehemiah recalled the sin of Solomon with its causes and its consequences, and completed the reform begun by Ezra. In the after history of Israel it would seem that marriages with "strange women" were not practised.

B. The Roman Law.

Nothing in the ancient law of Rome corresponds with the impediment of religion in the Hebrew and Christian systems; but the disparity of rank was a very real impediment, and will be best considered under the head of Disparity of Condition.

C. The Law of the New Testament.

§ 1. In the New Testament we have only two passages which clearly relate to this impediment: —

1 Cor. vii: 39. The wife is bound by the law so long as the husband liveth; but if the husband be dead, she is at liberty to be married to whom she will, only in the Lord.

1 Cor. vii: 12–17. To the rest speak I, not the Lord: If any brother hath a wife that believeth not, and she be pleased to dwell with him, let him not put her away. And the woman which hath an husband that believeth not, if he be pleased to dwell with her, let her not leave him. For the unbelieving husband is sanctified by the wife, and the unbelieving wife is sanctified by the husband; else were your children unclean, but now are they holy. But if the unbelieving depart, let him depart; a brother or sister is not bound in such cases; but God hath called us to peace. For what knowest thou, O wife, whether thou shalt save thy husband? Or how knowest thou, O man, whether thou shalt save thy wife? But as God hath distributed to every man, as God hath called every man, so let him walk. And so ordain I in all churches.

§ 2. It can hardly be doubted, however, that the following passage bears upon the subject: —

2 Cor. vi: 14–16. Be ye not unequally yoked with unbelievers, for what fellowship hath righteousness with

unrighteousness? And what communication hath light with darkness? And what concord hath Christ with Belial? Or what part hath he that believeth with an infidel? And what agreement hath the temple of God with idols? For ye are the temple of the living God, as God hath said, I will dwell in them and walk in them, and I will be their God, and they shall be my people. Wherefore, come ye out from among them and be ye separate, saith the Lord, and touch no unclean thing; and I will receive you and be a Father unto you, and ye shall be my sons and daughters, saith the Lord God Almighty.

§ 3. The word rendered "unequally yoked," in the third of these passages is nearly the same that is used in the Septuagint version of Lev. xix: 19, to describe cattle of different kinds. The precept of the passage is that Christians should avoid close partnerships of all kinds with heathen or Jewish persons, from which disputes must almost certainly arise. According to the maxim of the Roman law copartnery is the mother of discords; and where there is an absolute contradiction between the religious sentiments of the partners, such as must then have existed between Christians and others, constant intercourse must have led to constant broils which could be avoided only at the cost of unworthy compromise. In the most ordinary transactions of life heathen practices or Jewish usages were customary. Hence the Jews had no copartnerships with heathen men. For a like reason the apostle exhorts the Corinthians to avoid copartnerships either with heathens or with Jews, and the principle of his counsel cannot fail to apply to the closest of all partnerships, which is marriage.

§ 4. Whatever may be thought of this, there can be no doubt that 1 Cor. vii: 39 requires that Christians in general, and not widows only, shall marry "only in the Lord," that is to say, that they shall not marry unbelievers. There is a prohibitive impediment at least, and that of the highest authority, in the way of such a marriage; but it does not appear either from the text itself, or from any other part of the New Testament that the impediment is also dirimant, or, in other words, that such a marriage, if actually contracted, is *ipso facto* void, or even voidable. How and with what qualification it came to be so considered in subsequent ages will appear in the canons, etc., given below.

§ 5. The case contemplated in 1 Cor. vii: 12–17, is that of persons married when both were infidels, and the question is not of their marriage but of their separation. St. Paul's counsel to them, as St. Augustine says, is not a command, but a personal counsel. In the passage which immediately precedes he had spoken by divine authority: "Unto the married I command, yet not I, but the Lord;" but when he comes to this case he says: "To the rest speak I, not the Lord." The counsel of the apostle, then, had not the sanction of divine command, and although it was doubtless wise at that time and under the conditions which then prevailed, it is conceivable that at a different time and under different conditions, the apostle himself might have advised in a different way. At that time, however, his advice to the believer was to remain with the unbeliever, hoping for his conversion; but if the unbe-

liever departed the believing husband or wife was under no obligation to remain unmarried. If it were necessary to justify the permission of the believing husband or wife to *put away* the unbeliever, which is certainly implied in the apostolic counsel, it might be said that the parties must at that time have been married either under the Roman or the Hebrew law, both of which permitted unlimited divorce, so that even if the believer put away the unbeliever, the dismissal would be no violation of the contract originally made between them. On the other hand, however, our Lord's words are absolute and universal that "whosoever shall put away his wife saving for the cause of fornication causeth her to commit adultery, and whosoever shall marry her that is divorced committeth adultery; and whosoever putteth away his wife and marrieth another committeth adultery. (Matt. v: 32, Luke, xvi: 18.) And yet it is to be remembered that in the judgment of many (see below under Dissolution of the Marriage Bond) the generic term *fornication*, for the cause of which divorce was lawful, certainly includes idolatry and probably includes other forms of unbelief. From the canons, etc., given below it will be seen that in later ages certain councils of the church not only permitted, but required some converts to separate from conjugal partners who remained in unbelief.

D. Canons, Decrees, etc.

94. *Conc. Eliberit.* (A. D. 305), c. 10. If any (unbaptized) woman shall be abandoned by a catechumen and shall afterwards marry another man, she may be admitted to bap-

tism, and the like rule shall be followed if an unbaptized man be abandoned by a wife who is a catechumen.

95. c. 15. Christian virgins are not to be given in marriage to heathen men, though there may be an over-abundance of girls; lest when their age come to its flower, it turn them to adultery of the soul (*i.e., to heathenism*).

96. c. 16. Neither shall Christian girls be given to heretics who stray from the Catholic Church; neither to Jews nor to heretics; for there can be no fellowship of a believer with an unbeliever.

97. c. 17. If any have given their daughters to heathen priests it is decreed that they shall not receive communion even at death.

98. *Conc. Arclat. I*, (A. D. 314), c. 11. Concerning Christian girls married to heathen men, it is decreed that they be suspended for a time from communion.

99. *Conc. Laod.* (A. D. 343–381), c. 10. Members of the church shall not indiscriminately marry their children to heretics.

100. c. 31. It is not lawful to make marriages with all sorts of heretics, nor to give our sons and daughters to them; but rather to receive them, if they promise to become Christians.

101. *S. Ambros.* (circ. A. D. 360), De Abraham, c. 9. Beware, O Christian, that thou give not thy daughter to a heathen or a Jew; and beware, I say, that thou take not a heathen woman or a Jewess, or a heretic, or any alien from the faith, to be thy wife. And it is not enough that she be a believer, both parties must have been initiated by the sacrament of baptism.

102. *Conc. Hippon.* (A. D. 393), c. 12. The sons or daughters of bishops, or of any clergyman whatsoever shall not be married to heathens, or heretics, or schismatics.

103. *S. Augustin.* (circ. A. D. 400), De adult. Conj. i. cc. 13, 14. The apostle's counsel to believers not to put away an unbelieving husband or wife was a counsel, not a divine command, since he introduces his admonition with the words "To the rest speak I, not the Lord." And the apostle gives the reason of his counsel. It is not because of any bond of marriage (*vinculum conjugale*), which must be observed with such, but in order to win the unbeliever to Christ; for many things ought to be done, not because they are required by law, but out of spontaneous charity; and those duties are ever the more worthy and acceptable which we do for love's sake, and not of constraint. Thus our Lord himself, though he was not subject to tribute, paid it, nevertheless, lest he might put a stumbling block in the way of those whom he was leading to salvation.

104. *Conc. Carthag. III*, (A. D. 397), c. 12. The sons or daughters of bishops or of clergymen of any degree shall not be married to heathens, heretics, or schismatics,

105. *Conc. Chalced.* (A. D. 451), c. 14. Since, in certain provinces, it is permitted to the readers and singers to marry, the Holy Synod decrees that it shall not be lawful for any of them to take a heterodox wife. But those who have already begotten children of such a marriage, if they have had their children baptized among the heretics, must bring them into the communion of the Catholic church; but if they have not had them baptized, they may not hereafter baptize them among heretics, nor give them in marriage to a heretic, or a Jew, or a heathen, unless the person marrying the orthodox child shall promise to come over to the orthodox faith. And if any one shall transgress this decree of the the Holy Synod, let him be subjected to canonical punishment.

106. *Conc. Agath.* (A. D. 506), c. 67. Confirms the 31st canon of Laodicea.

107. *Conc. Arvern.* (A. D. 533), c. 6. No Christian man shall marry a Jewess, nor shall a Christian woman marry a Jew, under penalty of excommunication.

108. *Conc. Aurelian. II*, (A. D. 533), c. 18. It is decreed that no Christian man shall marry a Jewess, and that no Jew may marry a Christian; because we hold that the marriage of such persons is unlawful, and if such persons shall delay to break off from their union when warned so to do, without doubt they must be deprived of the grace of communion.

109. *Conc. Aurelian. IV*, (A. D. 541), c. 19. If a Jew shall attempt to unite to himself a Christian woman who is his bondmaid, he shall be punished by the loss of his bondmaid.

110. *Conc. Tolet. IV*, (A. D. 633), c. 61. Jews who have married Christian wives are to be admonished that if they wish their marriages to stand, they must become Christians. If they disregard the admonition, the parties must separate, and the children of such marriages are to follow the condition of the mother. In like manner children begotten of non-Christian wives by Christian husbands, are to be Christians, and not Jews, in religion.

111. *Conc. in Trullo*, (A. D. 691), c. 72. It is not lawful for an orthodox man to marry a heretic woman, nor an orthodox woman to marry a heretic man; and if this has been done by any person whatsoever, the marriage is to be held void, and the nefarious union is to be dissolved. If, however, any heathen persons have been united in lawful marriage, and one of them be converted to the faith, while the other remains in unbelief, then, if the Christian desires to remain with the unbeliever, they shall not be separated, according to the judgment of St. Paul.

112. *Conc. Trident.* (Sess. xxiv); c. 5. If any man shall

say that the bond of marriage can be dissolved on account of heresy, let him be anathema.

SCHOLIUM.

On examining these canons it appears that the rules increase in stingency with the advance in time.

a. At first Christian girls married to heathen men are to be suspended for a time, 98; and the children of believers are not to be married to Jews, heathens, or heretics 95, 96. To marry them to heathen priests is unpardonable guilt, 97.

b. It is forbidden to marry children to all (sorts of) heretics, 100, 101, 106; a reasonable provision, since under the name of heretics at that time a Mahometan, if there had been such, would have been equally included with the Cathari who were Catholics in faith, order and sacraments, and in fact were simply primitive puritans.

c. In Africa the rules against such marriages seem to have been made chiefly with reference to the clergy, 102, 103; and the same observation applies equally to the Œcumenical Council of Chalcedon, 104.

d. In France and Spain the number of Jews caused the canons to be directed chiefly against them, 107, 108, 109, 110; and there disparity of religion becomes a dirimant impediment, 108, and the civil authority is to enforce it by forfeiting slave property, 109.

e. The Greek synod *in Trullo* declares the impediment of heresy to be dirimant, 111.

f. The Canon of the Council of Trent is unfortunately not sufficiently explicit. It declares it to be an article of faith that marriage may not be dissolved on account of heresy, but it does not distinguish between heresy existing in either party before marriage, and a lapse into heresy after marriage. In the latter case undoubtedly the marriage holds

under the present canon law of Rome; but the case of a marriage with a person who is a heretic at the time of the marriage is not so clearly contemplated; since, if the impediment is held to be dirimant, there would be no question of *dissolving* a marriage which, by the nature of the case, could not have been validly contracted.

Actual Law of the Roman Church.

The author of the volumes on Canon Law in the Theological Encyclopædia of the Abbé Migne, writes with the official approbation of the archbishop of Sens, and his account of the impediment of religion, as it actually operates in the Roman church may be briefly summarized as follows: —

1. The disparity of religion exists either between a baptized person and one who is unbaptized or between a Catholic and a heretic.

2. In the former case the impediment is dirimant by general custom if not by positive law; in the latter it is prohibitive only, the church never having declared such marriages to be null though it has always forbidden them.

3. If one of two married infidels is converted, the church does not require their separation, though the other remain in infidelity.

4. The apostasy of a married Christian does not permit his marriage with another Christian to be dissolved.

5. It is a serious question among casuists whether the marriage of a catholic with a heretic can be permitted without sin. At all events it is not without precedent, since the late Pope Gregory XVI. sanctioned the marriage of the Duke of Orleans with the Princess Helen, who was a Lutheran. But at Rome such permissions are granted only for grave reasons and after careful provision for the preservation of the faith and for the nurture of children in the Catholic religion.

VIII. DISPARITY OF CONDITION.

The consideration of this impediment requires an examination of three particulars: First, the capacity of a slave to contract a marriage with another slave; second, the marriage of a slave with a person of free birth; and third, marriage prohibited on account of great disparity of rank.

A. The Hebrew Law

§ 1. Among the Hebrews slavery included three classes of persons: Hebrews, reduced by poverty to a condition of temporary servitude which was always terminated by the year of jubilee, (Exod. xxi: 1–11, Lev. xxv: 39–46, Deut. xv: 12–18, Jer. xxxiv: 12–16); captives taken in war, or strangers bought with money, (Numb. xxxi: 26, Deut. xxi: 10–14, Gen. xvii: 12, 23, Exod. xii: 44, Lev. xxxv: 44, 46), and slaves of alien blood but "born in the house," (Gen. xiv: 14, xv: 3, xvii: 23).

§ 2. In the patriarchal age the custom of taking slaves as concubines was too common to require any notice of particular cases, but the intense love of offspring which characterized the Hebrew women gave rise to a very peculiar fiction, by which the wife gave her slave as a concubine to the husband, and then the children of the concubine were considered as the legitimate children of the wife (Gen. xvi: 1–3, xxx: 1–4, 9, 10.). The concubine, however, still remained "in the hand" of the wife (xvi: 6), and, with the the husband's consent, might be sent away, and her children with her. The children of other concubines

(Gen. xxv: 5, 6) seem not to have been reckoned as legitimate. Throughout the period of the patriarchs we read of no instance of marriage between a free woman and a slave, nor does any such instance occur in Hebrew history.

§ 3. Moses recognized slavery and regulated it in the interest of humanity. According to the rabbins the master of a Hebrew slave who was married before his servitude began, was bound to provide for the slave's family; but if the master gave him a wife during his servitude, there was an express provision for the protection of the marriage.

Exod. xxi: 2–7. If thou buy a Hebrew servant, six years he shall serve, and in the seventh he shall go out free for nothing. If he came in by himself, he shall go out by himself; if he were married then shall his wife go out with him. If his master have given him a wife, and if she have borne him sons or daughters, the wife and children shall be her master's and he shall go out by himself. And if the servant shall plainly say, "I love my master, my wife, and my children, I will not go out free," then shall his master bring him unto the judges, he shall also bring him unto the door or unto the door-post, and his master shall bore his ear through with an awl, and he shall serve him forever.

§ 4. It was quite in accordance with Hebrew customs that a man might sell his children into servitude as well as himself. If the child were a son, his service terminated at the appointed time, according to the law; but a daughter, if she was sold to become her master's wife, was to remain his wife forever. For the protection of such a marriage Moses provided.

Exod. xxi: 7–11. If a man sell his daughter to be a maid-servant, she shall not go out as the men-servants do. If she please not her master who hath betrothed her to himself, then shall he let her be redeemed; to sell her unto a strange nation he shall have no power, seeing he hath dealt deceitfully with her. And if he hath betrothed her unto his son, he shall deal with her after the manner of daughters. If he take him another wife, her food, her raiment, and her duty of marriage shall he not diminish; and if he do not these things unto her, then shall she go out free without money.

§ 5. The case of a captive woman which is regarded in no other ancient code of laws, did not escape the humanity of the Hebrew lawgiver.

Deut. xxi: 10–14. When thou goest forth against thine enemies, and the Lord thy God hath delivered them into thine hands, and thou hast taken them captives, and seest among the captives a beautiful woman, and hast a desire unto her that thou wouldest have her to thy wife, then shall thou bring her home to thine house, and she shall shave her head and pare her nails, and she shall put off the raiment of her captivity from off her, and shall remain in thine house, and bewail her father and her mother a full month, and after that thou shalt go in unto her and be her husband, and she shall be thy wife. And it shall be, if thou have no delight in her, then thou shall let her go whither she will, but thou shall not sell her at all for money, thou shall not make merchandise of her, because thou hast humbled her.

SCHOLIA.

1. From the foregoing passages it appears —

a. That the marriage of slaves with slaves was permitted and protected.

b. That the marriage of a free man with a slave woman was permitted.

c. That a slave woman married to her master was a wife, and not necessarily a concubine; and

d. That a slave woman married to her master was to all intents and purposes a free woman.

2. But on the other hand it is to be observed

e. That the marriage of a free woman with a slave is nowhere sanctioned or recognized as in any way possible. It is probable that such a marriage, if ever made, was made only by the lowest of the people.

3. The only recognition of rank which occurs anywhere in Hebrew legislation as an impediment to marriage is connected with the marriage of priests, and will be properly considered under the head of *Order*.

B. The Roman Law.

§ 1. By the ancient Roman law, an honorable marriage (*justæ nuptiæ*, *justum connubium*) could be contracted by Roman citizens with Roman citizens only. With a Latin, or a foreigner, or a woman belonging to a conquered people, there could be nothing more than lawful concubinage, such that the children born of it followed the condition of the mother, unless the mother were a Roman citizen, in which case they followed the condition of the father. They could never be citizens unless it were proved that one of the parents, being a Roman citizen, had believed the other to be of equal rank (Gai. Inst. I, 65–80). As Gibbon says (Roman Empire, chap. xliv), even "the blood of kings could never mingle in legitimate nuptials with the blood of a Roman; and the name of Stranger degraded Cleopatra and Berenice to live the *concubines* of Mark Antony and Titus."

§ 2. A slave, by the Roman law, was merely a thing, a chattel, without rights, and incapable of making any contract. Hence he was incapable of lawful marriage, or even concubinage, and any association he might maintain, either with another slave or with a free woman, was not marriage in the eye of the law, but mere cohabitation or *contubernium*. The children of such associations followed the condition of the mother. If the mother was free, the child was free, and if the mother was a slave the child was a slave (Gai. Inst. I, 82). By a decree of the senate under Claudius, a free woman who had contracted with a master for the right to cohabit with one of his slaves was condemned to be the mother of slaves who became the property of their father's master, but the rule was repealed by Hadrian. (Gai. Inst. I, 84.) By an ancient law, if a free woman had children by a slave whom she supposed to be a free man, the male children were the property of the slave's master, and she was permitted to retain the females only. This law was repealed by Vespasian; but it continued to be the law that the children of a free-woman who cohabited with a slave, knowing him to be such, should be slaves (Gai. Inst. I, 85, 86); and a woman who continued to cohabit with a slave against the will and prohibition of the master was herself reduced to slavery (Gai. Inst. I. 160).

§ 3. By a law of Constantine (Cod. Justin. lib. V. tit. xxvii, leg. 1,) senators and other men of high rank were to be outlawed and condemned to infamy if they recognized their children by certain women as their heirs. Such women were a slave or the daughter of a

slave; a freed-woman or her daughter; an actress or her daughter; a shop-keeper or her daughter; any low-born or abject woman; or the daughter of a pander or public huckster. With such women there could be neither marriage nor legitimate offspring.

§ 4. Valentinian and Marcian (A. D. 454) confirmed the law of Constantine (Cod. Justin. lib. V. tit. v. leg. 7), but defined the phrase "low-born or abject" so as not to include any woman of free descent, however poor she might be, and declared that between women of free descent, wealth and opulence make no distinction.

§ 5. By a wise, humane, and altogether Christian decree, Justinian swept away not only the cruel law of Constantine, but the prohibition of marriage with all the classes of women named except slaves (Cod. Justin. lib. V. tit. iv. leg. 23).

C. The Law of the New Testament.

§ 1. In the New Testament there is no reference to the marriage of slaves, or to any impediment of condition; but, while the influence of Christianity could not otherwise operate than so as to ameliorate the deplorable state of the slave population, we may well believe that the universal public opinion which condemned the intermarriage of persons of free birth with slaves, or even with persons of servile origin, would long continue to prevail among the members of the church. If we may believe the vehement invective of S. Hippolytus, Pope Callistus himself had been a slave, and made a strong though ineffectual effort to break down the general prejudice. In his administration of

the church (A. D. 219–223) he is said to have permitted women to form illegal connections with slaves or others of low rank, and to consider such connections as marriage, though, in the eye of the law they were merely *contubernia*, and in popular estimation wholly disreputable. Hippolytus affirms that though the women availed themselves of the permission to consort with such men, they were not willing to bear children whose illegitimacy would be a disgrace to their families. Accordingly the practice of abortion became common among such women, so that Callistus is accused of having been a teacher of adultery and murder at the same time. However that may be, the fact that his allowance of such marriages could lead, as it well might, to such results, and that his conduct was made a principal charge against him in a bitter contemporary invective; above all, the undoubted fact that the effort of the slave-born pope to obliterate the social and legal distinctions of his day ended in failure and scandal, proves how strong the impediment of condition must have been in the minds of the Christians themselves, as well as by the force of law. (See Hippolytus Philosophumena, lib. ix, in Bishop Wordsworth's St. Hippolytus and the Church of Rome).

§ 2. If this were the proper place it might easily be shown that the influence of the church tended irregularly, it is true, but, on the whole, steadily, to the betterment of the condition of the slave, and also to the final extinction of slavery. But it would be an error to suppose that in the early ages of the church slavery was regarded as an evil in itself. The church

accepted slavery, as it accepted everything else, except idolatry, that had the sanction of the laws. It recognized that, as a matter of fact, a slave had not power over his own body and that he could make no binding contract. Hence it was evident that if he married any person of his own class, or any free person who knew his servile condition, the contract must be wholly spiritual, could not be legal, and must be liable to interruption, or even to disruption, at any moment; and if he married a free person who was ignorant of his condition, it was evident that he was guilty of a fraud which vitiated the contract from the beginning. How the church proceeded to teach and enforce the new doctrine that the master owed a duty to his slaves, and how it led up to a recognition of rights belonging to the slave which masters were bound as Christians to respect, will be seen below.

D. Canons, Decrees, Etc.

113. *Apost. Const.* viii. 32. If a slave man or woman have a wife or a husband, let them be taught to be content with one another; but if they be unmarried, let them learn not to commit fornication, but to enter into lawful marriage.

114. If a master who is one of the faithful shall know that his slave is guilty of fornication, and will not give the man a wife or the woman a husband, let him be suspended.

115. If a concubine who is the bondwoman of an unbeliever keep herself to her master alone, let her be received (to baptism), but if she be incontinent with others, let her be rejected.

116. If a believer have a bondwoman as a concubine, let

him give her up; if his concubine be a free woman, let him marry her lawfully, or be suspended.

117. *S. Basil.* (A. D. 370), c. 40. If a bondwoman submit herself to the will of a man without the consent of her master, she commits fornication; for the contracts made by persons (*i.e.*, either slaves or children) who are under the power of others are of no force.

118. c. 42. Marriages contracted without the consent of those who have authority are fornication; and, therefore, during the lifetime of the father or master they cannot be free from impeachment until they have been ratified by his consent; only then do they acquire stability.

119. *Leo I, Papa* (A. D. 440–461), Epist. ad Rustic. Narbon. Ep. To put away a bondwoman from one's bed and take a wife of unquestionable free birth, is not a duplication of marriage, but an advance in probity. Not every woman who is joined to a man is the man's wife, any more than every son is the heir of him by whom he was begotten. By the Lord's ordinance, long before the Roman law began to exist, the legitimate bonds of marriage were between free persons of equal condition. Therefore, if a clergyman have given his daughter to a man who had a concubine, it is not to be held the same as if he had given her to a married man, unless the concubine had been emancipated and raised to honor by a public marriage. A woman married, by her father's choice, to a man who has been keeping another woman is entirely blameless, unless the other woman had been publicly married to the man. A wife is one thing; a concubine is another.

120. *Conc. Aurelian*, IV, (A. D. 541), c. 15. If slaves or any persons else who are under the power of another, betake themselves to the precincts of the church in the hope that they will be able there to contract marriage, license to

marry shall by no means be granted to them, and no such union shall be protected by the clergy. But the parties shall be restored to their parents or masters, as the case may be, and they shall be required to promise that they will separate; though the parents or masters may afterwards unite the parties in marriage, if they so will.

121. *Conc. Tolet.* XIII. (A. D. 683), c. 5. Forbids the marriage of a king's widow as an execrable crime.

122. *Conc. Cæsaraugust* III. (A. D. 691), c. 5. A queen who survives her husband is to lay aside her worldly rank and habit, and is to retire permanently into a convent.

123. *Conc. Vermer.* (A. D. 753), c. 6. If a free man have taken to wife the bondwoman of another man, believing her to be free, and she be afterwards discovered to be a slave, let him redeem her if he can; otherwise, let him marry another woman if he will. But if he knew her to be a slave and yet married her, let him consider her as his lawful wife. So, also, ought a woman to do who has married the slave of another.

124. c. 7. If a slave has had a bondwoman as a concubine, he may, if it is so desired, put her away, and take as his consort (*comparem*) a slave belonging to his master; but it is better to keep his own. [The canon is obscure. The language is: *Si servus suam ancillam concubinam habnerit i.e.*, if a slave has had a bondwoman *of his own* as a concubine; whereas, a fundamental idea of slavery is that the slave can have nothing of his own; whatever he has belongs to his master. The last words correspond with the first: *Melius est suam ancillam tenere, i.e.*, it is better to keep *his own* bondwoman.]

125. c. 8. If a slave be set at liberty by his master and afterwards commit adultery (*sic*) with one of his master's bondwomen, will he nill he, he shall have her as his wife, if

the master so will. And if he shall put her away and marry another, he shall be compelled to put the second wife away, and either to take back the woman with whom he committed adultery or to remain unmarried.

126. c. 13. If a man, knowing a woman to be a slave, has voluntarily married her nevertheless, he shall cleave to her ever afterwards.

127. *Conc. Compend.* (A. D. 757), c. 5. If a free woman have married a slave, knowing him to be a slave, she shall cleave to him ever afterwards; and there shall be one and the same law for man and woman.

128. *Conc. Cabilon.* (A. D. 813), c. 30. It has come to our ears that certain persons, misled by the presumption of their power as masters, and forgetting the saying of the gospel that those whom God hath joined together no man may put asunder, have broken up the lawful marriages of their slaves. Wherefore, our sentence is that the marriages of slaves shall not be broken up, though they be slaves of different masters; but the parties shall abide in one marriage, and serve their respective masters. This rule, however, is to hold only in the case of marriages which have been lawfully contracted with the consent of masters.

129. *Conc. Tribur.* (A. D. 895), c. 38. A free man who has married a freed woman (*i.e.*, one who has been a slave but has been manumitted) must cleave to her as his wife.

130. *Decretals of Gregory IX.* (A. D. 1230), IV. 9; 1. A slave is competent to contract a marriage which his master forbids, but he is not on that account freed from his master's service in other respects. [Adrian I., A. D. 772, 796.]

131. IV. 9; 2, 3. When a free man has married a slave woman of whose condition he was ignorant, the marriage is voidable, unless the man has cohabited with the woman after he knew her to be a slave. [Alexander III., A. D. 1159–1181, and Urban III., A. D. 1185–1187.]

132. IV. 9; 4. If a free man has married a slave, not knowing her condition, and, from the time he learned it, withdrew his consent, the marriage is dissolved, and he may marry again. [Innocent III., A. D. 1198–1216.]

SCHOLIA.

1. From the very first it is evident: —

a. That the church took issue with the Roman law by maintaining the reality of the marriage covenant between slaves, 113.

b. And that masters were required to provide for the marriage of their slaves, 114.

c. But from the nature of the case the master's consent to a slave's marriage was indispensable, 117, 120, 124.

d. One obscure canon seems to imply the right of masters to dissolve the marriage of a slave to which he had not consented, 124.

e. But a later and unequivocal canon peremptorily forbids them to break marriages to which they have consented, 128.

f. And at length it is declared that the consent of a master is not necessary to a slave's valid marriage, 130.

2. We must also observe: —

a. The gentleness exhibited towards bondwomen who were compelled to be concubines of their masters, provided that, while submitting to their fate they kept themselves from licentiousness, 115.

b. At the same time concubinage was plainly discouraged, 116.

c. And the distinction between a wife and a concubine was discriminated with some severity, 119.

3. Of the marriage of the free with slaves:—

a. If it were done knowingly, the church consistently maintained the validity of the contract, 125, 126, 127.

b. But if there were fraud or error the marriage was void, 123, 127, 132.

c. And if cohabitation continued after discovery of the error, the marriage was to stand, 131.

d. Hence, it is evident that the impediment of condition was never dirimant: the marriage was not *ipso facto* void; it was not necessarily void even in case of error, though clearly so in case of fraud; and yet, in any case, subsequent consent gave validity to the marriage.

4. Perhaps the most ridiculous instance of the worship of mere human rank to be found in ecclesiastical legislation is that of the prohibition of any marriage of the widows of princes, which was imposed by the Spanish Councils of Toledo and Saragossa, 121, 122.

E. Anglican Reformation.

By 32 Henry VIII., cap. 38 (A. D. 1541), which declared that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical Degrees, the whole impediment of condition was made to disappear from the thought of the Anglican Church.

IX. THE IMPEDIMENT OF AGE.

It is abhorrent to natural reason that children of tender age, who are physically incapable of the conjugal function, and mentally incapable of intelligent consent, should be married at the arbitrary discretion of others, either to persons of like age or to maturer persons.

A. The Hebrew Law

Does not contemplate the possibility of the marriage of persons below the age of puberty.

B. The Roman Law.

§ 1. The laws of Rome forbade marriage before the age of puberty.

Just. Inst. lib. v. tit. 10. A right marriage is contracted between Roman citizens who come together according to the precepts of the laws, the males being of the age of puberty, and the females being *viripotentes.*

§ 2. Sufficient sexual maturity was thus provided for, but a more exact reckoning of age was afterwards required.

Digest. lib. xxiii. tit. 2. leg. 4. If a woman is married under the age of twelve years, she will not be a lawful wife until she attains that age.

C. The Law of the New Testament.

There is nothing in the New Testament, nor in any early legislation of the church, bearing upon this impediment. Indeed, it is only in some peculiarly artificial state of society that there could be any necessity of legislation concerning it. Such a condition of things, however, appeared and continued under the feudal system, when female children were often left in infancy as heiresses of properties and even of princedoms, which were acquired to their husbands; and when nothing was more common than to assure the alliance of sovereigns or of families by contracting a marriage between their children. Against the absurd, and sometimes unnatural marriages which were thus made, the church exerted its influence, but often, it is to be feared, without effect.

The following canons, etc., require no explanation or remark.

D. Canons, Decrees, etc.

133. *Conc. Forojulian.* (A. D. 791), c. 9. Let no one

presume to give a boy or girl in marriage before the age of puberty, nor persons of dissimilar age, but only such as, being of like age, shall give reciprocal consent.

134. *Conc. Ticin.* (A. D. 850), c. 24. No adult woman shall be married to a boy of immature age.

135. *Nicolaus I., Papa* (858–867), Decr. P. II., Caus. XXX., q. 2. Where the consent of either party is lacking there is no marriage. Therefore persons who give girls yet in their cradles in marriage to boys, or boys in their cradles to girls, accomplish nothing, unless both of the children give their consent after they have arrived at years of discretion.

136. *Conc. Nemans.* (A. D. 1096), c. 13. Little girls under twelve years of age may not be married.

137. *Provincial Constitutions of Simon Abp. of Canterbury* (A. D. 1328). Recite the decree of Nicolaus I. as above and add: And by authority of this decree we forbid that, for the time to come, any persons of whom one or both may be under the age designated by the laws and canons, shall be married to each other unless in case of urgent necessity such a union should be allowed for the sake of peace.

138. *Decretals of Gregory IX.* (A. D. 1230), IV. 2; 1. A father may validly betroth a son who has not reached the age of puberty; but not one who has reached that age unless the latter consents. [Hormisdas, A. D. 514–523.]

139. IV. 2; 2. No person of tender age (*impuber*) ought to be married unless for (some urgent necessity as for) the sake of peace. [Nicolaus I., A. D. 858–867.]

140. IV. 2; 3. In the questions relating to marriage the age of puberty is understood to have been reached when the male is capable of generation and the female of conception. [Isidore of Seville, died A. D. 636.]

141. IV. 2; 4. The betrothals of children in their cradles

(the case is that of a girl under seven years of age) are null. [Alexander III., A. D. 1159–1181.]

142. IV. 2; 6. If a girl of tender age is betrothed and delivered to her husband, and afterwards desires to marry a different man, her petition is not to be granted if her husband swears that he has had carnal knowledge of her even at the early age of eleven or twelve. [Idem.]

143. IV. 2; 7. If children of over seven years of age are betrothed, neither can recede before puberty. The party who first reaches puberty must wait for the other; and if at the time of the betrothal the one was capable of marriage and the other was not, the latter only has the right to withdraw. [Idem]

144. IV. 2; 8. Children of tender age who are betrothed to each other ought not to be separated before puberty; but after reaching puberty, if they renounce the contract, they may be separated unless they have had carnal knowledge of each other. [Idem.]

145. IV. 2; 9. Minors, capable of the function of marriage, are bound to each other by the contract of marriage unless violence is proved. [Idem.]

146. IV. 2; 10. A marriage between children of tender age is void, even when carnal copulation between them has been attempted. [Urban III., A. D. 1185–1187.]

147. IV. 2; 11. If an adult woman has been betrothed, against her will, to a child of tender years, she is not bound to wait till he reaches puberty, but may marry another. [Idem.]

148. IV. 2; 12. A betrothal contracted with a child of tender age becomes valid if the parties live together for seven years; but it is void if either of them marries sooner. [Clement III., A. D. 1187–1190.]

E. Anglican Reformation.

Canons of 1603, c. 100. No children under the age of one and twenty years complete shall contract themselves, or marry, without the consent of their parents, or of their guardians, or governors, if their parents be deceased

X. IMPEDIMENT OF IMPOTENCE.

§ 1. Impotence is a physical disqualification in either man or woman preventing the consummation of marriage, whether the cause be congenital malformation, or whether it be the result of accident, mutilation, or disease. The Hebrew laws and the ancient laws of Rome know nothing of this impediment, and it was not until A. D. 528, that it was first recognized by Justinian as a sufficient cause for divorce.

Cod. Just., lib. v. tit. 17, cap. 10. If a husband shall be unable through natural impotence to pay the conjugal debt to his wife within two full years after their marriage, the wife or her parents shall have the right to dissolve the marriage without forfeiture of dowry.

§ 2. By a later decree, however, Justinian required a longer trial before allowing divorce.

Novel. XXII. 6. By a former law we granted the right of divorce to a woman whose husband had not shown himself to be possessed of virility within two years after his marriage. That law we now somewhat amend by changing two years to three years. For we have learned from circumstances which have since arisen, that certain men who had been impotent for more than two years, afterwards became capable of begetting children.

§ 3. In all legislation concerning this impediment

there are peculiar difficulties. Of the dirimant character of the impediment there is no question, since nature itself forbids the marriage of those who are incapable of the function of marriage. If the impotent person is ignorant of the misfortune until the marriage has been celebrated, the other party cannot be justly condemned to a life of involuntary continence because the former has made a contract which he is not able to perform; and if the impotent person, knowing himself to be such, has nevertheless married, he has been guilty of a fraud which alone vitiates such a contract.

§ 3. The chief difficulties concerning this impediment are these: —

1. The first is that the fact of its existence must be unknown, before the marriage, certainly to one of the parties and frequently to both; so that questions arising out of it must generally relate, not to the prevention of marriage, but to the dissolution of marriage, which ought never to be rashly conceded.

2. The second is the ease with which married persons without children might obtain divorce by agreeing to pretend that one of them is impotent.

3. A third is the difficulty of proving the fact of impotence alleged by one party and denied by the other.

4. Impotence may be permanent or it may be only temporary, as appears from the Novel of Justinian above given.

5. Canonists distinguish between *absolute* impotence and *relative* impotence; and though the subject cannot well be discussed, even in this work, there seems to be no doubt that in marriages brought about between unwilling persons by the constraint of relatives, or through other influences, their mu-

tual repugnance is capable of inspiring a man who is not *absolutely* impotent with such disgust as to make him impotent *relatively* to that woman. It is a historical fact that young men have been married to women of such age and deformity as amply to justify the distinction of the canonists.

After these remarks, the following canons, etc., will require no further elucidation so far as physical impotence is concerned.

§ 4. There still remains the impediment of intellectual incapacity to make a contract of marriage.

§ 5. This impediment may arise either from *madness*, or from *imbecility*.

§ 6. Marriage contracted during the actual insanity of one of the parties is necessarily void, since he is incapable of the *consent* which makes a marriage; but insane persons are not necessarily insane at all times, and if an insane person marries during a lucid interval when he has the use of his reason, the marriage is good.

§ 7. In the case of imbecile persons, it is to be observed that there are degrees of imbecility; and although the marriage of such persons is always to be discouraged, yet, so far as the validity of a particular marriage goes, the question is whether the party understood what he was doing. If he did, the marriage stands.

CANONS, DECREES, ETC.

149. *Gregor. I. Papa* (A. D. 590–604), apud Decr. II. xxvii. q. 2. c. 29. You have inquired whether persons who are married and yet cannot have carnal knowledge of each other may marry other persons. Concerning

such the law is that if a man and woman have married, and the woman afterwards declares that the man is not able to have knowledge of her, and if she can prove that her allegation is true, she may marry another. But if the man marry another woman they must be separated.

150. Idem, apud Decr. II. xxxiii. q. 1. c. 2. If married persons are unable to have knowledge of each other through frigidity of nature, let them live together as brother and sister, and if they break the marriage, let them live single; for if they were unable to have knowledge of each other, how shall they do better in a new marriage? If the man desires to marry again, it is evident that his impotence arose from a suggestion of the devil causing him to hate his wife and seeking a false pretext for putting her away. But if the woman is resolved to marry and have children, and if both parties swear that they have never been made one flesh by the act of copulation, it is humane to let her marry on account of her carnal infirmity; but the man never.

151. *Greg. II, Papa* (A. D. 715–731), Epist. ad Bonifacium. Your second question is this: If a woman be seized with infirmity so that she cannot render the conjugal debt to her husband, what shall the man do? We answer that it would be well for him to abide so, and observe continence; but since this is exceedingly difficult, let him who cannot contain marry rather than sin. Nevertheless, he is not to withdraw his support from her who is suffering from infirmity, and not dismissed for any detestable crime. [This decree properly belongs to the Dissolution of Marriage, where it is also inserted; but the Roman canonists maintain, against all probability, that the infirmity with which the woman is said to be afflicted came upon her before the consummation of the marriage, and thus presented the impediment of impotence.]

152. *Conc. Vermer.* (A. D. 753), c. 17. If a woman complain that her husband hath never had knowledge of her, let them make oath on the cross, and if her complaint be true, let them be separated; and the woman may do what she will.

153. *Conc. Compend.* (A. D. 757), c. 17. If a man has married a wife and has had her for some time, and the woman declares that he has never known her, while the man affirms that he has, the man, being the head of the woman, must be believed.

154. *Hincmar Remens. Archiep.* (A. D. 860), Epist. ad Rodulph. If a marriage is prevented from being consummated by the magical arts of sorcery, such as the devil contrives, and the hidden but never unjust judgment of God permits, the parties are exhorted to betake themselves to acts of penitence and almsgiving that they may be relieved as Abimelech was in the days of Abraham, through the exorcism and other assistance of the church. But if no efficient remedy can be found they may separate and enter into other marriages; on this condition, however, that if both parties survive the persons whom they had married after their separation, they may never marry each other again, though they may believe that the difficulty is entirely removed.

155. *Decretals of Gregory IX* (A. D. 1230), IV. 1; 24. A madman cannot contract a marriage. [Innocent III, A. D. 1198–1216.]

156. IV. 15; 1, 7. If a husband and wife agree in declaring that the man is impotent, the marriage is dissolved and the woman may marry another; but if it afterwards appear that the church has been deceived, the former marriage must be restored. If the woman declares and the man denies that he is impotent, indubitable proof of the alleged fact must be given. [From an old penitential.]

157. IV. 15; 2. Impotence, whether natural or resulting from old age, renders a man incapable of contracting marriage. [Alexander III. A. D. 1159–1181.]

158. IV. 15; 3, 6. A natural malformation of the woman which renders her incapable of conjugal intercourse, and which cannot be cured by medical art, is a just impediment of marriage, and a just cause for its dissolution. [Alexander III, and Innocent III.]

159. IV. 15; 4. If a person knowingly marries another who is incapable of the conjugal act, the marriage stands. [Lucius III, A. D. 772–796.]

160. IV. 15; 5. If married persons declare that it is not possible to have intercourse with each other, they are to remain together for three years; and if they then swear in a family meeting that the impediment continues, the marriage is to be dissolved forthwith. [Celestine III., A. D. 1191–1198.]

XI. PRECONTRACT.

The impediment of precontract exists when either of the parties is already married or betrothed to another.

A. The Hebrew Law.

Since polygamy was permitted by the law of Moses, it is evident that the impediment of precontract could not exist otherwise than by some special engagement made before marriage or betrothal, and by which the husband pledged himself to take no other wife.

B. The Roman Law.

§ 1. From time immemorial the Romans were a monogamous people, and bigamy was an infamous

crime; but the facility of divorce for any cause, or without cause, which was allowed in later times, and the informality with which a valid divorce was effected, removed the temptation to the crime of bigamy.

§ 2. Although betrothal was not of such weight under the Roman law as it afterward became under the laws of the church, it was so much regarded that a person who was betrothed to two other persons at the same time was branded by the law with public infamy, no less than a bigamist.

Dig. lib. III., tit. iii, 1, 13. Any person is to be marked with public infamy who is either betrothed or married to two other persons at the same time; and the law is to be understood in this sense, that the one contract cannot be made while the other contract endures; it also applies to any person betrothed to one and married to another.

§ 3. It does not appear, however, that a marriage made in contempt of an existing betrothal was void as well as infamous. A bigamous marriage was void, of course.

C. The Law of the New Testament.

§ 1. The re-establishment, by our Saviour, of the primitive law of monogamy, necessarily restored the impediment of precontract, so far as previous marriage is concerned, among all Christians of the Hebrew race; but his prohibition of divorce, save for the cause of fornication, gave it a far wider scope than it had had even under the laws of Rome. By declaring that he who puts away an innocent wife and marries another, is guilty of adultery, and that any man who marries a

woman so put away is also guilty of adultery, he virtually declared that the bond of marriage remains in such cases unbroken after cohabitation has ceased; and that the impediment of precontract continues to forbid the marriage of such persons. The impediment is not merely prohibitive, it is dirimant. If such persons enter into conjugal associations, their unions are not marriage; they are not concubinage, which might possibly be lawful; they are not the *contubernium* which the Roman law despised, but which might be holy matrimony to the slave; from their inception to the last day of their endurance they are a continuous crime, — the crime of adultery.

§ 2. It is to be remembered, however, that the law of Christ in this matter is his law for Christians. It declares the original and ideal law of God, from which Moses had granted a temporary dispensation to the Hebrews, because of the hardness of their hearts; and in the facility of divorce allowed in other nations and by other religions, there was no greater laxity than Moses had permitted. Hence, no question was raised concerning the marriages contracted by converts previously to their conversion. Though a Jew or a Roman might have been often divorced before his baptism, his then existing marriage was accepted and recognized. St. Paul, indeed, conceded that a believing convert might put away an unbelieving husband or wife, though he advised strongly against it, on the ground of charity, if the unbeliever were willing to remain; and the canons of the church have generally ruled in the same sense. (See the Impediment of Religion.)

§ 3. The remarriage of persons who have put away a husband or wife for just cause will be best considered under the Dissolution of Marriage.

§ 4. Betrothal or espousal, as an impediment to marriage, does not appear in the New Testament.

Canons, Decrees, etc.

§ 1. Of the obligation of the impediment of precontract, in the case of persons already lawfully married, there was never any doubt in the church. Hence, there was little legislation for its enforcement, except in the cases arising in connection with the dissolution of marriage, which are elsewhere considered.

§ 2. The obligation of betrothal, however, was less easily enforced, because less generally nnderstood.

§ 3. The sacredness of all contracts being constantly urged by Christian teachers, it is evident that a contract of marriage, such as a betrothal really was, must have been regarded with peculiar sanctity.

§ 4. To the Christian mind a betrothal was, to all intents and purposes, a marriage of which the consummation was postponed to a convenient time; and the usage of Scripture itself justified the calling of the betrothed parties by the name of husband and wife. Hence, when so considered, the impediment of precontract attended a betrothal as well as a marriage.

§ 5. Apart from conditions which might be more or less explicitly made in connection with a betrothal, there was always one question to be determined, namely, when the contract should be fulfilled. The time might be fixed definitely or indefinitely in the

future, or it might be agreed that the contract should be effectual (with or without consummation) from the moment that the parties pledged their troth, each to the other. In the former case, it was a betrothal (*sponsalia*) or contract (*contractus*) *de futuro;* that is to say, a promise to marry; in the latter case it was an actual marriage (*contractus de præsenti*).

§ 6. The recognition of such a distinction necessarily did away with the entire doctrine that every betrothal is equivalent to marriage; and hence we find that in later times only a contract *de præsenti* was attended by the same disqualification for contracting marriage with a different person as a marriage publicly celebrated and duly consummated; while a simple betrothal, or contract *de futuro*, was attended by a prohibitive, but not dirimant, impediment.

§ 7. Betrothals in the early ages were generally celebrated publicly; but by the civil law they were equally valid if contracted privately. The question, "*Spondesne?*" with the answer, "*Spondeo*" ("Do you pledge your troth?" "I do.") was all that the law required. The church recognized the obligation of such a pledge; and as the church and the law agreed in the judgment that reciprocal consent is the one and only thing necessary to the validity of a marriage between competent persons, it followed that under the name of contracts *de præsenti* a large number of clandestine marriages were made, many of which were afterwards alleged as a means of breaking other marriages more regularly contracted and yet alleged to be void because of some previous contract *de præsenti*

made by one of the parties, but wholly unknown to the other. A reference to the decretals given below will show the variety of cases which grew up in connection with the impediment of precontract.

§ 8. The common mediæval practice of betrothing children to each other before the age of puberty caused the necessity for much of the legislation which is given under the Impediment of *Age*.

§ 9. The innumerable evils and scandals which resulted from the allowance of clandestine contracts *de præsenti*, whether of children or of adults, became at length intolerable; and the Council of Trent (see below, 371) decreed that thereafter all clandestine marriages should be absolutely and *ipso facto* null and void.

161. *S. Ambros.* (A. D. 333–397), De Inst. Virg., c. 6. When the conjugal union is begun, then the conjugal name is taken; for it is not the deflowering of virginity that makes the marriage, but the conjugal agreement. A girl becomes a man's wife when she is married to him, not when he has carnal knowledge of her.

162. *S. Hieron.* (A. D. 340–420), Super Matt. i. 18. Remember that it is the custom of Scripture (as in the case Joseph and the Blessed Virgin) to call a betrothed man a husband, and a betrothed woman a wife.

163. *S. Augustin.* (A. D. 354–430), De Nuptiis, I. 11. She, whom Joseph neither had known nor ever would know, is called his wife from the first pledge of espousal; and yet the name of wife was not deceptive, though there neither had been nor was to be any carnal commingling. Wherefore both of them were rightly called the parents of Christ;

not the Mother only, but he also who was her husband in heart, though not after the flesh.

164. *Siricius Papa* (A. D. 385–399), Epist. ad. Himer. You ask whether a man may marry a woman betrothed to another. Such a marriage we forbid and anathematize in every way, for it is a kind of sacrilege to transgress the benediction which is given by the priest to persons who are betrothed.

165. *Conc. in Trullo.* (A. D. 691), c. 37. If a man has taken a woman who is either married or betrothed to another man, and she is afterwards taken away from him, and he then marries another woman, he is guilty of adultery with the first, not with the second.

166. c. 98. If a man marry a woman betrothed to another man who is still living, he shall be under judgment of adultery.

167. *Greg. I, Papa* (A. D. 590–604), Epist. ad. Mauric. Imperat. Let the man who has married another man's betrothed wife be anathema, with all who consented unto him; because by the law of God he is appointed unto death. For it is habitual in the divine law to call betrothed women wives, as it is written in the Gospel: Fear not to take unto thee Mary, thy wife.

168. *Conc. Roman. sub Eugenio. II, Papa* (A. D. 826), c. 37. No man shall have two wives, or a wife and a concubine at the same time.

169. *Conc. Meld.* (A. D. 845), c. 68. He who takes a woman betrothed to another man, shall not pass without public penance, and he shall pay a fine to the injured man according to law (*legaliter*).

170. *Decretals of Gregory IX*, (A. D. 1230), IV. 1; 2. A betrothal, even when confirmed by an oath, may be dissolved by the consent of both parties. [Innocent III, A. D., 1198–1216.]

171. IV. 1; 5. If a man who is betrothed to a woman leaves the country and does not proceed to marriage, the woman may marry another, even if the betrothal was confirmed with an oath; but if the fault was hers she must do penance. [Alexander III, A. D. 1159–1181.]

172. IV. 1; 9. If a man and woman promise each other that from that time forward they will hold themselves to be man and wife, the contract is a marriage forthwith *(contractum est matrimonium de præsenti)*. [Idem.]

173. IV. 1; 10. If a man swear to a woman that he will marry her, he is compelled to marry her under pain of ecclesiastical censures, unless some valid impediment appear. [Idem.]

174. IV. 1; 12. If one of two betrothed persons make oath to the existence of a canonical impediment to their marriage, they shall not be married. [Idem.]

175. IV. 1; 15. A betrothal, if followed by carnal conjunction, is not dissolved by a subsequent contract *de præsenti* with another woman. [Idem.]

176. IV. 1; 17. A man who has promised with an oath to marry a woman ought to be exhorted rather than compelled to keep his promise. [Lucius III, 1181–1185.]

177. IV. 1; 22. A betrothal, though confirmed with an oath, is dissolved by the actual marriage of either party, but not by the betrothal of one of them to another person. [Innocent III.]

178. IV. 1; 30, 32. A betrothal becomes a marriage if followed by carnal copulation, but not by a mere attempt to copulate. [Gregory IX, A. D. 1227–1241.]

179. IV. 1; 31 and IV. 4; 1, 3, 5. A contract *de præsenti* is dissolved neither by a second contract of the same kind, nor even by a marriage consummated with carnal knowledge; but a simple betrothal, though confirmed

with an oath, is dissolved by a subsequent contract *de præsenti*. [Gregory IX, Alexander III, Innocent III, and (erroneously) St. Augustine.]

180. IV. 4; 1. If a man contracts *de præsenti* with two women successively, he must hold to the first; but if he is simply betrothed to the first and afterwards contracts with the second *de præsenti*, he must hold to the second. [Errone ously attributed to St. Augustine.]

181. IV. 4; 2. Appoints the penance of a man who has taken to wife a woman espoused to another man by a contract *de præsenti*. (He is to put the woman away, to fast on bread and water for forty days, to be under penance for ten years, and is to be forever incapable of marrying another.) [From an old penitential.]

182. IV. 5; 3, 5, 6. If a man has made oath that he will marry a woman on any condition that is not vile or unreasonable (*e.g.*, that he shall receive a sum of money, or that his father shall consent), he is not bound unless the condition is fulfilled; but he may recede from his own condition, and if he has carnal knowledge of the woman the condition falls. [Alexander III, Urban III, A. D. 1185–1187, and Innocent III.]

183. IV. 5; 7. If to a contract of marriage any base or impossible condition is annexed, such a condition is voided by the contract; but if the condition is inconsistent with the nature of marriage, the condition voids the contract. (In the latter class, for example, would be a condition that the marriage shall be only temporary, or that the procreation of children shall be prevented, or that the woman shall submit to prostitution. These are the cases given in the decree which is by Gregory IX. himself.)

184. IV. 8; 2, 3. Lepers may marry if they can find persons willing to marry them; but, if a person is betrothed

to another who becomes a leper before the marriage, the healthy person is not bound to marry the leper, but is free to marry another. [Alexander III. and Urban III.]

185. IV. 19; 8. If a heathen man who has had several wives come to baptism he must keep the wife whom he first married; and if he has put her away and married another, then, even after baptism, he must put away the second and return to the first, though she may have been married in the meantime to another man; but if she has committed fornication he need not return to her. [Innocent III.]

Scholium.

The earlier Christian law may be briefly summarized: —

a. Since the essential thing in marriage is the nuptial contract and not the carnal consummation of it; 161,

b. Therefore, following Scriptural usage, the names of husband and wife are rightly given to the betrothed; 162, 163;

c. And to marry the betrothed wife of another man deserves penance; 169.

d. By the Greeks it is held to be adultery; 165, 166.

e. And by popes it was forbidden with anathema, as a kind of sacrilege; 164, 167.

The Decretals cannot well be further condensed or classified.

E. Anglican Reformation.

§ 1. By the 32 Henry VIII., cap. 38 (A. D. 1541), the manifold mischiefs are shown which result from making that unlawful which God hath made lawful, particularly in the dissolving of marriages that have been long made, upon pretence of precontract, and

prohibiting marriages by God's law, to the great vexation and mischief of the parties, and to the easy dissolving of marriages; wherefore it is enacted that all marriages being solemnized and consummated, and not prohibited by God's law, shall be lawful, good, just, and indissoluble, notwithstanding any precontracts.

§ 2. 2 Edward VI. (A. D. 1548), recites 32 Henry VIII., cap. 38; alleges that it has occasioned great mischief by encouraging persons to neglect and break contracts; repeals all that it contains concerning precontracts; and enacts that ecclesiastical judges shall give sentence in cases of precontracts as they did before.

§ 3. 1 Eliz., cap. 1 (A. D. 1558), revived 32 Henry VIII. 38 (repealed under Mary), except the part repealed by 2 Edward VI.

§ 4. The following paragraph is taken from Blunt's Annotated Book of Common Prayer, p. 267: —

There is evidence of public espousals having been made in the church of England as late as the time of Charles I. For in the parish register of Boughton, Monchelsea, in Kent, is the following entry: "Michaelis, 1630. Sponsalia inter Gulielm. Maddox et Elizabeth Grimestone in debit' juris forma transacta 10 die Januarii." Two years and three-quarters afterwards comes the entry of the marriage: "Michaelis, 1633. Nuptiae inter Gulielmu. Maddox et Elizabetha. Grimestone, ultimo Octobris." (Burns' List of Fleet Marriages, p. 2.) The ancient oath of espousals was administered in this form: "You swear by God and His holy saints herein, and by all the saints in Paradise that you will take this woman, whose name is N., to wife within forty days, if the

Holy Church will permit." The hands of the man and woman being then joined together by the priest, he also said: "And thus ye affiance yourselves;" to which they made an affirmative reply, an exhortation concluding the ceremony.

XII. THE IMPEDIMENT OF VOW.

Of Vows in General.

§ 1. A vow is a promise made to God of some good thing or of some good action to which one is not otherwise obliged.

§ 2. In order to the validity of a vow it is necessary that it should be made freely, advisedly and deliberately, by a competent person, and that the thing promised should be lawful and possible.

a. A *vow* must be *freely made*, or it is not a promise made to God, but a promise exacted by a fellow-creature. This rule excludes all forced vows of marriage or celibacy.

b. It must be made *advisedly;* that is to say, the person must understand the nature of his promise; since the justice of man, not to speak of the mercy of God, cannot exact the fulfilment of a promise which is more or other than the promiser understood it to be.

c. It must be made *deliberately;* not in a state of passion, madness or drunkenness; for no promise given in such a state is really a promise to God.

d. The *person* must be *competent*, not only in respect of age and reason, but also in relation to others: thus, a minor or a married woman, whom the law forbids to dispose of property, cannot make a valid vow to give property to charitable uses, without having the consent of parents or husband, as the case may be.

e. The *thing* promised must be *lawful*, or the promise itself is not good, and must be displeasing to God.

f. It must also be possible; for if it is impossible, either the person has not understood what he promised, or else the vow itself is impious trifling with God, and therefore is not only invalid but sinful.

§ 3. Canonists distinguish vows as *absolute* or *conditional*, — a distinction which needs no definition.

§ 4. They also distinguish between vows as real, personal, or mixed. A vow is said to be *real*, when it relates to things (*res*), as when one promises to give a sum of money to the poor; it is *personal*, when it relates to oneself, as when one vows to make a pilgrimage, or to remain unmarried; it is *mixed*, when it is both real and personal, as when one promises to fast for a certain time and to give alms to a certain amount.

Of Vows of Celibacy.

§ 1. A vow of continence or celibacy is a promise made to God to keep one's self in chastity, abstaining from marriage or the use of marriage.

§ 2. It is either a *simple* vow, as when one privately promises that he will observe chastity, though living in the world; or it is a public and solemn *profession*, made with the sanction of the church.

§ 3. It may also be either *temporary*, so as to bind the party for a time fixed; or it may be *perpetual*, binding him throughout his life.

§ 4. The whole force of the impediment to marriage created by a vow of celibacy, turns on these general questions: 1st. Whether the state of celibacy is more

pleasing to God, either for the cultivation of holiness or as a voluntary self-discipline, freely accepted as an act of penitence, than the state of marriage; 2d, whether, admitting the celibate state to be preferable, it is wise or safe to make a vow of celibacy; 3d, whether the vow, when once made, may lawfully be broken, if the person finds that he cannot contain; 4th, whether the vow is of such obligation that a marriage subsequently made in violation of it is, *ipso facto*, void by the law of God; and 5th, whether the church, in the absence of explicit divine command, has the right to declare the vow to be a dirimant impediment of marriage. These are ethical and theological questions, and are merely incidental in this work, but it is necessary to note them in this place, in order that the reasons of the legislation of many ages may be borne in mind.

A. The Hebrew Law.

§ 1. Of vows of celibacy we find nothing in the Old Testament, save in one doubtful and irrelevant case; but of the practice and regulation of vows in general there are many instances. The earliest is that of Jacob.

Gen. xxvii: 20–22. And Jacob vowed a vow, saying, If God will be with me, and will keep me in this way that I go, and will give me bread to eat and raiment to put on, so that I come again to my father's house in peace; then shall the Lord be my God; and this stone which I have set for a pillar shall be God's house; and of all that thou shall give me, I will surely give the tenth unto thee.

§ 2. That the vow of Jacob was not disapproved was afterwards made to appear.

Gen. xxxi: 11, 13. And the angel of God spake unto me in a dream, saying, Jacob; and I said, Here am I. And he said, * * * I am the God of Bethel, where thou anointedst the pillar, and where thou vowedst a vow unto me. Now, arise, and get thee out of this land, and return into the land of thy kindred.

§ 3. The vow of Jephthah (Judges xi: 30), and of Absalom (2 Sam. xv: 7–9) are later examples.

§ 4. The law of Moses accepted the custom of making vows to the Lord, and regulated it by provisions which seem to have been intended for the double purpose of maintaining due reverence for such promises, and also of preventing evils that might arise from such vows. A man might devote himself or any of his children in the Lord, and such a vow was to be strictly kept; but he might redeem himself or them for a fixed sum of money (Lev. xxvii: 1–8). It was under this law that Hannah, with the consent of her husband Elkanah, devoted Samuel to the service of God forever (1 Sam. i: 28). In like manner an Israelite might devote a beast (Lev. xxvii: 9–13), or his house (14, 15), or a field (16–24), to the Lord; and in every case rules were laid down for the redemption of the devoted thing.

§ 5. A singular vow was that of the Nazarite who was pledged either for a limited time or for life to abstain from wine and strong drink. He might taste nothing that came from the vine, moist or dried,

"from the kernels even to the husk." His hair was to remain unshorn, and he was not to approach any dead body nor to be "unclean for the dead," even if it were his father or mother, brother or sister. If any one died suddenly in his presence, he was to begin the performance of his vow again from the beginning, after making atonement by a sin offering and a burnt offering; and "all the days of his separation he was holy unto the Lord." If the vow of the Nazarite was for a limited time, its fulfilment was celebrated with much ceremony, with a burnt offering and a peace offering, with a meat offering and drink offering, and a wave offering (Lev. vi.); but the obligation of the Nazarite might continue throughout his life, and it might even be laid upon him before his birth, as in the case of Samson (Judges xiii: 5; xvi: 17), and of John Baptist (Luke I: 15). It is to be presumed however, that it was almost always voluntary, and of limited duration.

§ 6. In principle, the vow of the Nazarite was distinctly and unequivocally ascetic; and in connection with the subject of monasticism in later times it is chiefly valuable because it certifies to an allowance of asceticism in the Old Testament which was not repealed in the New.

§ 7. The sadly doubtful issue of Jephthah's vow (Judges xi: 30–40) would cast no light upon the subject before us, even if it were certain, as it unfortunately is not, that his hapless daughter was devoted to a life of involuntary celibacy, instead of dying by the hand of her still more unhappy father. So far as she was con-

cerned, she had made no vow; and yet it is to be feared that the example of Jephthah in arbitrarily making a vow by which his daughter was to suffer, may have been used in later times to justify deliberate cruelties on the part of Christian parents.

§ 8. Concerning vows made by a person in a dependent condition, the law of Moses was peremptory in denying their validity unless they were confirmed, tacitly at least, by the consent of parent or husband (Numb. xxx.). Children seem to have been incapable of making vows, and no restriction was laid upon grown men, widows, or divorced women.

B. The Roman Law.

Among the Romans vows of celibacy were unknown, and to this assertion the institution of the virgin prietesses of Vesta is no exception, since the celibacy of the Vestals was an obligation imposed upon them, not a state of life freely and religiously accepted by them. The number of priestesses was only six, but in addition to these there were always novices in course of preparation, and some who, having fulfilled their term of service, were occupied in the training of novices. The novices were required to enter between the ages of six and ten years. They were seldom voluntarily devoted by their parents, and were therefore chosen by lot from a number selected by the Pontifex Maximus. They were originally required to be patricians; but the reluctance of parents to give up their children to such a life was so great that they were afterwards taken from the plebeians; and, at length

the children of freedmen (*libertinæ*) were made eligible. The Vestals were required to serve for thirty years; ten in learning the sacred mysteries, ten in the duties of the priesthood, and ten in the instruction of novices. At the end of their service they were free to unconsecrate themselves and return to the world, or even to marry. During their service any violation of chastity was punished with death, the unhappy woman being entombed alive. The Vestals were honored above all other women. Their evidence was received in courts of law without the sanction of an oath; they were preceded by a lictor when they went abroad; consuls and prætors made way for them, and lowered their fasces; any man who passed under the litter in which they were borne was put to death; and if they accidently met a criminal on his way to execution, they might claim his release. Their ashes, after death, were interred in the pomoerium.

C. The Law of the New Testament.

§ 1. In the New Testament we find that the practice of making vows continued, both among the Jews and among the Christians, and that they were made even by an apostle; for not only did more than forty of the Jews "bind themselves with an oath neither to eat nor to drink till they had killed Paul" (Acts xxiii: 21), but we read that St. Paul himself tarried at Corinth a good while, "having shorn his head in Cenchrea, for he had a vow" (Acts xviii: 18). From the shaving of the head which is mentioned, we must infer that the vow of the apostle was either the vow of a Nazarite or at least similar to it in its ascetic character.

Vows, then, and ascetic vows, were sanctioned by the apostles of Christ. It is to be seen what was the Christian doctrine concerning celibacy as a state of life.

§ 2. It must certainly have produced a deep impression that the Son of God when he took it upon him to deliver man did not abhor the Virgin's womb, but was born of a woman whom the universal tradition of the church declares to have remained ever a virgin, and that the Son of Man himself dwelt among us in a state of virginity.

§ 3. To say the least, the teaching of our Saviour could only tend to favor celibacy as a voluntary though exceptional state of religious life. He represented the grace which makes it possible as a gift of God; and he cited without reprehension the example of those who had accepted it, not by self-mutilation, but by living as eunuchs do. He that was able to receive that gift, he bade receive it. And in speaking of the perfect life in which the faithful shall be "as the angels which are in heaven" (Mark xii: 25) he declared that there is neither marrying nor giving in marriage there.

Matt. xix: 10–12. His disciples say unto him, If the case of a man be so with his wife, it is not good to marry; but he said unto them, All men cannot receive this saying save they to whom it is given; for there are some eunuchs which were so born from their mother's womb; and there are some eunuchs which were made eunuchs of men; and there be eunuchs which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it.

Luke xx: 34–36. The children of this world marry and are given in marriage; but they which shall be accounted worthy to obtain that world and the resurrection from the dead, neither marry nor are given in marriage; neither can they die any more, but are equal unto the angels, being the children of the resurrection.

§ 4. Nevertheless, it appears that St. Peter and the brethren of the Lord, and the apostles generally, were married men, for no other construction can fairly be put upon 1 Cor. ix: 5, 6, which is rightly rendered in the Westminster Revision: "Have we no right to lead about a wife that is a believer, even as the rest of the apostles, and the brethren of the Lord, and Cephas? or I only and Barnabas, have we not a right?" etc. It is probable also that St. Paul had been married before his conversion. But as the "distress" approached (1 Cor. vii: 26) which our Lord had so often foretold with special reference to them that should be with child and to them that should give suck in those days (Matt. xxiv: 19; Luke xxii: 23), St. Paul clearly saw the troubles that must necessarily attend the marriage of Christians. He had no divine guidance concerning this particular matter, but in the exercise of his deliberate judgment, he advised the unmarried to abide so.

Cor. vii: 25–28. Concerning virgins I have no commandment of the Lord, yet I give my judgment as one that hath received mercy of the Lord to be faithful. I suppose, therefore, that this is good for the present distress, namely, that it is good for a man to be as he is. Art thou bound unto a wife? seek not to be loosed. Art thou loosed from a wife? seek not a wife. But and if thou marry, thou hast

not sinned; and if a virgin marry, she hath not sinned. Nevertheless such shall have trouble in the flesh, but I spare you.

§ 5. The proper establishment of a daughter by a judicious marriage depended, according to the custom of those days, much more upon parents, than it does among any English-speaking people now, and in a time of uncertainty and increasing distress it would naturally cause great anxiety; but St. Paul, still speaking with "no commandment of the Lord," advises them rather to keep their daughters than to marry them.

1 Cor. vii: 36–38. If any man think that he behaveth himself uncomely toward his virgin (daughter), if she pass the flower of her age and need so require, let him do what he will; he sinneth not; let them marry. Nevertheless, he that standeth steadfast in his heart, having no necessity, but hath power over his own will, and hath so decreed in his heart that he will keep his virgin, doeth well. So then, he that giveth her in marriage doeth well; but he that giveth her not in marriage doeth better.

§ 6. For another more general reason St. Paul discouraged marriage, namely, that the cares and duties of life which are incident to the married state, are apt to draw the mind away from the things of God.

1 Cor. vii: 32–35. I would have you free from cares. He that is unmarried careth for the things that belong to the Lord, how he may please the Lord; but he that is married careth for the things that are of the world, how he may please his wife. There is a difference also between the wife and the virgin. The unmarried woman careth for the things of the Lord, that she may be holy both in body and spirit;

but she that is married careth for the things of the world, how she may please her husband. And this I speak for your own profit; not that I may cast a snare upon you, but for that which is comely, and that ye may attend upon the Lord without distraction.

§ 7. At heart, it is impossible to doubt that St. Paul held celibacy to be preferable to marriage. He so declares in the plainest and most emphatic terms, but he claims no right or authority to command in this matter. For most men, continence, as our Lord had said, is not possible; therefore, to most men, marriage is not only a right but a duty. In the married state the punctual payment of the conjugal debt is an indispensable obligation; and yet abstinence for religious reasons is at times commendable and desirable, even for the married.

1 Cor. vii: 1–11. It is good for a man not to touch a woman; nevertheless to avoid fornication, let each man have his own wife, and let each woman have her own husband. Let the husband render unto the wife due benevolence, and likewise also the wife unto the husband; the wife hath not power of her own body, but the husband; and likewise also the husband hath not power of his own body, but the wife. Defraud ye not one another, except it be by consent for a time, that ye may give yourselves to fasting and prayer; and come together again that Satan tempt you not for your incontinency. But I speak this by way of permission, not of commandment. For I would that all men were even as myself; but every man hath his own gift from God, one after this manner, and another after that. But I say to the unmarried and to widows, it is good for them if they abide even as I; but if they cannot contain, let them marry, for it is better to marry than to burn.

§ 8. Incidentally, too, the apostles exhibited a high esteem for the state of virginity in either sex. Thus St. Paul considers it the ideal illustration of a holy church.

2 Cor. xi: 2. I am jealous over you with godly jealousy, for I have espoused you to one husband, that I may present you as a chaste virgin unto Christ.

§ 9. St. John, too, in the Apocalypse, gives to virgin men a place in the presence of the Lamb, as his constant attendants, and attributes to them heavenly powers to which none others can attain.

Rev. xiv: 1–4. And I looked, and lo a lamb stood on the Mount Zion, and with him a hundred, forty and four thousand, having his Father's name written in their foreheads; and I heard a voice from heaven as the voice of many waters, and as the voice of a great thunder; and I heard the voice of harpers harping with their harps; and they sung, as it were a new song before the throne and before the elders, and no man could learn that song but the hundred and forty and four thousand which were redeemed from the earth. These are they which were not defiled with women, for they are virgins. These are they which follow the Lamb withersoever he goeth.

§ 10. During the lifetime of the apostles, however, the New Testament gives us no intimation that any monastic vows were ever made by men of any age, or by unmarried women; but that widows, pledged to abide so, had become a recognized class among the Christians is abundantly evident from the writings of St. Paul, who speaks of their *enrollment*, as the West-

minster Version rightly renders it, describes their qualifications, insists that they be of ripe age; and among his reasons for not receiving younger women, he declares, as the result of his experience, that they will probably cast off their first faith, and fall into condemnation by marrying. In every case he insists that natural obligations are to be paramount, and to take precedence of all exceptional aspirations.

1 Cor. v: 9, 10. Let none be enrolled as a widow under three score years old, having been the wife of one man, well reported of for good works: if she hath brought up children, if she hath used hospitality to strangers, if she hath washed the saints' feet, if she have followed every good work.

4, 8. But if any widow have children or grandchildren, let them learn first to show piety towards their own family, and to requite their parents, for this is acceptable in the sight of God. If any provide not for his own, and specially for those of his own household, he hath denied the faith and is worse than an infidel.

3, 5. Honor widows that are widows indeed. She that i a widow, indeed and desolate trusteth in God and continueth in supplications and prayers night and day.

11–15. The younger widows refuse; for when they have waxed wanton against Christ they desire to marry, having condemnation because they have rejected their first faith. And withal they learn also to be idle, going about from house to house; and not only idle, but tattlers also and busybodies, speaking things which they ought not. I desire, therefore, that the younger widows marry, bear children, rule the household, give none occasion to the adversary for reviling; for already some are turned aside unto Satan.

Scholium.

The sum of the New Testament teaching is clearly this: —

a. Our Lord's birth, teaching, and example favor the celibate life; but

b. He plainly intimates that the peculiar grace which makes chaste celibacy possible is a rare and exceptional gift.

c. The apostolic teaching which has come down to us altogether favors celibacy in those who have the gift; and yet

d. Hardly any of the apostles themselves were celibates.

e. No vows of continence on the part of men are hinted at, nor on the part of any women except widows.

f. Even widows were not to be enrolled under sixty years of age; because

g. Experience showed from the very first that younger women were likely to break the pledge of celibacy implied (or *perhaps* vowed) at the time of their enrollment, and

h. Such a backsliding was regarded as an offence against Christ; but, even so,

i. The apostle gives no hint that the marriage of enrolled widows either was, or ought to be, or could be, regarded as void.

D. Canons, Decrees, etc.

186. *Ap. Can.* 51. If any bishop, presbyter, or deacon, or any at all of the Sacerdotal List, shall abstain from marriage, or flesh, or wine, not for discipline, but because he abhors them; forgetting that all things are very good, and that God made man male and female; but blasphemously slandering God's work; let him amend, or be deposed and cast out of the church. Likewise a layman.

187. *Conc. Eliberit.* (A. D. 305), c. 13. If virgins who

have dedicated themselves to God break their covenant of virginity, and give way to lust, not understanding what manner of deed they have done (*i.e.*, continuing to sin, *Hefele*), they shall not receive communion, even at death; but if they were but once persuaded, or if they fell but once through infirmity of the flesh, and shall afterwards be chaste and lead all the rest of their life in penitence, they may receive communion at death.

188. c. 27. No bishop or other clergyman shall have any other woman dwelling with him than a sister or a daughter, and she dedicated to God.

189. *Conc. Ancyr.* (A. D. 314), c. 19. If any persons who profess virginity shall disregard their profession, let them do the penance of digamists.

190. *Conc. Gangr.* (A. D. 343–381). c. 1. If any one shall condemn marriage, or abominate and condemn a faithful and pious woman who sleeps with her own husband, as though she could not enter into the kingdom, let him be anathema.

191. c. 9. If any one shall remain virgin or observe continence, abstaining from marriage because he abhors it, and not on account of the beauty and holiness of virginity itself, let him be anathema.

192. c. 10. If any one of those who are virgin for the Lord's sake shall insult the married let him be anathema.

193. c. 21. These things we write, not to cut off those in the church of God who wish to lead an ascetic life, according to the Scriptures, but those who carry the pretence of asceticism to superciliousness, both exalting themselves above those who live more simply, and introducing novelties contrary to the Scriptures and the ecclesiastical canons. We do, assuredly, admire virginity (attended) by humility; and we have regard for continence, accompanied by godliness

and gravity; and we praise a retreat from worldly occupations (when it is made) with lowliness of mind; (but, at the same time) we honor the holy companionship of marriage, and we do not contemn wealth enjoyed with uprightness and beneficence.

194. *St. Basil.* (A. D. 370), c. 18. The ancients received a virgin who had married as one guilty of digamy; but such a person ought to be dealt with more severely than widows professing chastity, and even as an adulteress. Nevertheless, virgins ought not to be permitted to profess virginity until they are at least sixteen or seventeen years of age, after trial, and at their own earnest request. If their relations, for secular reasons, offer them at an earlier age they ought not to be received.

195. c. 19. As to vows (of continence) by men, we know nothing, except that, by becoming monks, they appear without word spoken, to have thereby adopted celibacy. Yet I think that they should be interrogated and that a promise should be required of them, so that if they betake themselves to a carnal life they may be punished as fornicators.

196. c. 24. A widow admitted as a deaconess at sixty years of age, and afterwards marrying, is not to be received into communion until she has left the man. If she was admitted under sixty, she is not to be punished, as the bishop is to blame.

197. *Conc. Valent.* (A. D. 374), c. 2. Virgins dedicated to God who turn to earthly marriages are not to be easily admitted to penance, and when they have been admitted, unless they have made full satisfaction to God, the communion is to be withheld for a reasonable time.

198. *Conc. Carthag.* IV. (A. D. 398), c. 104, enacts, and at some length, justifies the enactment, that women left widows at a mature age, who have made a vow of chastity and have afterwards married shall be excommunicated.

199. *Conc. Tolet. I.* (A. D. 400), c. 16. If a virgin dedicated to God marries, she shall not be admitted to penance until after the death of her husband, unless she abstain from conjugal intercourse with him.

200. c. 19. If the daughter of a bishop, priest, or deacon who has dedicated herself to God sins and marries, her parents are forbidden to have intercourse with her under penalty of excommunication; and the woman shall not be admitted to communion after the death of the man until she has done penance; but if she leaves the man during his lifetime and submits to penance, she shall in no wise receive communion till she is at the point of death.

201. *S. Augustin.* (A. D. 400). De Bono Viduitatis, c. 8. St. Augustine argues at length that marriage after and in violation of a vow of continence is not void, and that the parties to it ought not to be required to separate; though he condemns the breaking of such a vow as a heinous crime. The good of marriage, he says is always a good in some sort, and although continence is better, yet all men are not able to receive that saying. In the bond of marriage virgin chastity cannot be preserved, but at least damnation need not be feared. They who have married after a vow of continence are condemned not because of their marriage but because of their breach of sacred promise. This is the meaning of St. Paul when he says that the widows who wax wanton against Christ marry, *because they cast off their first faith;* so that, if they have spiritually receded from their first faith, they fall into condemnation whether they marry or not. In conclusion he says, "Therefore I cannot say that when women abandon their better purpose and engage in marriage, their union is adultery and not marriage. But I cannot hesitate to say that their falling away, and their ruin of the holier chastity which they had vowed to God, is worse than adultery."

202. *Innocent. I., Papa.* (A. D. 402–417). Epist. ad Victric. c. 1. They who have professed an intention to remain in virginity, even though they have not yet taken the veil, if they shall afterwards marry, must be under penance for a time. For if a contract made in good faith with men, is not to be broken on any account, the promise which a woman has made to God, cannot be set aside without punishment.

203. c. 12. They who are spiritually wedded to Christ, and are veiled by a priest, if they afterwards marry openly are not to be received to penance until the persons whom they have married are dead. For if the rule holds that a woman who marries a second husband while her first husband lives, is to be accounted an adulteress, and is to be refused penance until one of the adulterous parties dies, much more must it hold in the case of a woman who has wedded a husband who cannot die and afterwards gone into marriage with a man.

204. *Conc. Chalcedon.* (A. D. 451), c. 15. A woman shall not be ordained a deaconess under forty years of age, and then only after searching examination. And if, after she has been ordained and has continued for a time to minister, she shall despise the grace of God and give herself in marriage, she and her husband shall be anathematized.

205. c. 16. It is unlawful for a virgin who has dedicated herself to God, and likewise for monks, to marry; and if they are found to have done this let them be excommunicated. But we decree that in every place the bishop shall have the power of indulgence towards them.

206. *Conc. Arelat. II.* (A. D. 452), c. 33. Virgins consecrated to God, if they marry after they are fifteen years of age, are to be excommunicated and their husbands with them, but they may be admitted to communion after a long time (*multo tempore*).

207. *Conc. Turon. I.* (A. D. 461), c. 6. A man who marries a consecrated virgin is to be excommunicated.

208. *Gelasius. Papa.* (A. D. 492–496). Epist ad Sicil. Episc. c. 9. Neither do we suffer widows to marry after they have long remained in a religious purpose and under daily observation; and in like manner we forbid marriage to virgins who have passed many years of their life in monasteries.

209. *Conc. Aurelian. I.* (A. D. 511), c. 21. A monk who marries shall never become a clergyman.

210. *Conc. Aurelian. II.* (A. D. 533), c. 16. Deaconesses received heretofore contrary to the interdict of the canons (*i.e.*, probably, under the canonical age), if they marry are to be excommunicated, but if they forsake their vile cohabitation (*contubernium*), on the admonition of the bishop, they may be re-admitted to the communion, after penance.

211. *Conc. Paris. II.* (A. D. 557), c. 4. Subjects a man who marries a consecrated widow or virgin, whether by solicitation or by violence, to excommunication and perpetual anathema.

212. *Conc. Turon. II.* (A. D. 567), c. 11. If a man has entered a monastery or has made application to be received into one, he shall not be permitted to leave it, nor (God forbid!) to marry or to enjoy familiarity with strange women. But if he marry he shall be excommunicated, and he shall be separated from cohabitation with his wife by the aid, if necessary, of the magistrate. And if he shall be contumacious, he and all his abettors shall be excommunicated.

213. *Conc. Matiscon. I.* (A. D. 581), c. 12. Consecrated virgins who marry, and also their husbands, are excommunicated till the end of their life.

214. *Gregor. I., Papa* (A. D. 590–604). Ad. Theod. Patr. xlv. When a good husband and his wife desire to increase their merit or to atone for past faults they are at liberty to

embrace continence and adopt the better life. But if the husband desires to embrace continence while the wife does not, or contrariwise if the wife desires it while the husband does not, they cannot separate; for it is written: *The wife hath not power of her own body, but the husband; and likewise also the husband hath not power of his own body, but the wife.*

215. *Conc. Paris. V.* (A. D. 615), c. 13. Widows and virgins who lay aside the religious habit and marry are to be excommunicated to the end of their lives.

216. *Conc. Toiet. IV.* (A. D. 633), c. 8. This very obscurely expressed canon provides that if a young married person has made a vow of continence in the near prospect of death and afterwards is not able to contain, the marriage privilege may be resumed. If the other party of the marriage dies, the survivor is not to marry again; but if the party who made the vow dies, the survivor may marry.

217. c. 48. A person may be made a monk either by his own profession, or by the devotion of his parents. In either way the bond holds, and we forbid to such persons any means of returning to the world.

218. *Conc. in Trullo.* (A. D. 691), c. 44. A monk who commits fornication, or who marries a wife, shall be subjected to the penance of fornication.

219. *Conc. Vermer.* (A. D. 753), c. 21. A man who has given his consent to his wife's taking the veil shall marry no other, but let him follow her example (by observing continence).

220. *Conc. Compend.* (A. D. 754), c. 3. If a married woman has taken the veil without her husband's consent, the husband, if he will, may take her back again into the married state.

221. *Conc. Forojul.* (A. D. 791), c. 11. Maids and wid-

ows who make a vow of continence are to keep their vow. If they marry they are to be separated.

222. *Conc. Roman sub Eugenio II.* (A. D. 826). As those who have chosen a monastic life are not at liberty to leave their monasteries, so those who have been shut up in monasteries against their will and for no sufficient cause of offence, are not to be held without their consent.

223. *Conc. Vern. II.* (A. D. 844), c. 5. Persons who have illicit commerce with nuns, and make sacriligious contracts of marriage with them, are to be suspended from communion until they have done public and satisfactory penance; but if penitent the viaticum is not to be refused to them on their death bed.

224. *Conc. Tribur.* (A. D. 895), c. 16. He who has been put into a monastery by parents (*primogenitores*) and has begun to read and sing in the church, can neither marry nor leave the monastery.

225. *Conc. Rotomag.* (A. D. 1072), c. 17. No man whose wife has taken the veil shall marry again while she lives.

226. *Conc. Lateran. II.* (A. D. 1139), c. 7. We have decreed that monks and professed religious who have transgressed their sacred purpose, and have coupled themselves with wives, shall be separated from them; for such copulation, manifestly contracted against the rule of the church, we judge not to be marriage. They who are thus separated from each other for offences so great shall undergo an appropriate penance. And we decree that the same rule shall hold in the case of nuns if they attempt to marry, which may God forbid.

227. *Decretals of Gregory IX.* (A. D. 1230), III. 31; 1. No person can be admitted to a religious order except of his own free will, and when of sufficient age. [Conc. Mogunt. A. D. 813.]

228. III. 31; 2. A boy who enters a monastery before he is fourteen years of age cannot be withdrawn by his parents after he has remained there for a year. If he enters after fourteen and remains for a year, he cannot withdraw, nor can he be withdrawn by his parents. [Conc. Mogunt. A. D. 813.]

229. III. 31; 4. A novice who, of her own will, wears the habit and engages in the functions of a professed religious, is to be regarded as *ipso facto* professed. [Conc. Tribur. A. D. 895.]

230. III. 31; 6. If the rule of any order is severe, no one is to be received into it under eighteen years of age. [Gregory I., A. D. 590–604.]

231. III. 31; 8. Profession is not valid under fourteen years of age; nor then without assuming the habit of the order for three successive days. [Alexander III., A. D. 1159–1181.]

232. III. 31; 14. If a father betake himself to a monastery with his son and bestow his goods upon the order, the son, on attaining his majority may withdraw and claim his lawful inheritance. [Celestine III., A. D. 1191–1198.]

233. III. 31; 15. A madman is not bound by a profession of monasticism unless he confirms it when restored to his senses. [Innocent III., A. D. 1198–1217.]

234. III. 31; 16. A profession ought neither to be made nor received within the term of probation; but if made and received it holds good. [Idem.]

235. III. 32; 2. Before a marriage is consummated, either party may enter a religious order, even against the will of the other party; but the other who remains in the world may marry again. [Alexander III.]

236. III. 32; 4. A married man may not enter a religious order unless his wife does likewise; or at least she must be above suspicion, and must promise continence. [Idem]

237. III. 32; 7. A woman betrothed by a contract *de præsenti*, but not carnally known, if she declares her purpose to enter a religious order is required to make her profession within a time certain, or else to cleave to her husband. [Idem.]

238. III. 32; 9. A married man who makes the vow and takes the habit of a religious order, with his wife's consent, though he may never enter a monastery, yet he cannot marry again after his wife's death. If he does the marriage is void, and he must be compelled to enter a monastery. [Urban III., A. D. 1185–1187.]

239. III. 32; 11. A married person who has made a simple vow of continence, must pay the conjugal debt, even if the other consented to the vow when made. [Celestine III.; the case is that of a sick woman making the vow when suffering from great depression.]

240. III. 32; 14; IV. 6; 6, 7. A contract *de præsenti*, or a consummated marriage, is dissolved only by a solemn profession, not by a simple promise to observe chastity while living in the world. [Innocent III., A. D. 1198–1216 and Celestine III.]

241. *Conc. Trid. Sess.* xxiv. c. 6. If any one shall say that a marriage which has not been consummated cannot be dissolved by a solemn profession of religion made by either party: let him be anathema.

242. Sess. xxiv. c. 9. If any man shall say that clergymen in Holy orders, or regulars who have solemnly professed chastity can contract marriage, and that the marriage if contracted is valid notwithstanding the ecclesiastical law or the vow; and that to maintain the contrary is nothing else than to condemn marriage; and that all who feel that they have not the gift of chastity can marry, even if they have vowed it; let him be anathema, for God denies not that

gift to them that rightly seek it, neither does he suffer us to be tempted beyond that we are able.

SCHOLIUM.

The substance of the foregoing canons, etc., may be presented briefly as follows: —

a. A chaste and humble life of ascrticism is commendable; 193; but

b. Contemners of marriage are anathematized and cast out of the church; 186, 190, 191, 192.

c. The self-dedication of virgins is very early recognized · 187, 188, 189.

d. Incontinence in such is a grievous sin; 187.

e. Even their marriage is a sin, and deserves penance, but is not void; 189, 194, 197.

f. To abandon an intention of professing chastity deserves penance; 202.

g. But the vows of virgins are not to be made under sixteen years of age, and then only after trial; 194.

h. Widows are to make no vows under sixty; 196.

i. And deaconesses (who were sometimes virgins, not always widows) were not to be ordained under forty; 204.

k. Consecrated women were early regarded as being espoused to Christ; 197, 203.

l. A deaconess marrying was anathematized; 204.

m. But not by the Greeks if ordained under sixty; 196.

n. And a consecrated widow was excommunicated if she married; 198, 215.

o. The Spanish councils severely punished the marriage of a consecrated virgin; 199, 200.

p. But the council of Chaledon left a power of indulgence with the bishop; 205.

q. And a virgin consecrated after the age of fifteen was to be subject to a long penance; 206.

r. Or even excommunicated; 213.

s. And the man who married her was excommunicated; 207, 213.

t. And laid under sentence of perpetual anathema; 211.

u. St. Augustine arguing the great guilt of a breach of vow, maintains the validity of marriages contracted against a vow of continence; 201.

v. And the moderation of Pope Gelasius is note-worthy in limiting his condemnation of such marriages to those who have long been following the monastic life; 208.

x. In the early ages monks made no vow of celibacy; 195.

y. But a monk who married could not become a clergyman of any order; 209.

z. And in a few generations he was stringently prohibited from marriage altogether; 212.

a′. Though the Greeks subjected a monk who married only to the penance of a fornicator; 219.

b′. At length restrictions of age began to be entirely set aside; 210;

c.′ And forced monasticism was approved; 217, 224;

d′. Though not by Rome; 222.

e′. The virtual separation of married persons by joint consent was encouraged; 214, 216, 219, 220, 225.

f′. And the obligation of a vow of continence became a dirimant impediment of marriage; 221; 226.

g′. The Decretals cannot be classified, cruel as they show some practices to have been. It is enough to notice that the age of profession had been reduced from sixty to fourteen, without distinction of sex, and without distinguishing virgins from widows.

XIII. THE IMPEDIMENT OF ORDER.

§ 1. Under the preceding head (Vow) all has been given which bears upon the obligation of a vow of cel-

ibacy freely made by any persons whatsoever, whether of the clergy or of the laity. The impediment of Order, however, had its origin in the opinion that the married state is inconsistent with the duties of the higher orders of the Christian ministry.

§ 2. It is needless to say that nothing of the sort is to be found connected with the Hebrew priesthood nor with any of the priesthoods of pagan Rome except that of Vesta which has already been mentioned under the head of *Vow*.

C. The Law of The New Testament.

§ 1. In the New Testament there is simply nothing to suggest that celibacy is more necessary or even more desirable for men in holy orders than for any others; and there is nothing whatever to suggest that the grace of holy orders includes the rare gift of the capacity of perpetual continence.

§ 2. On the contrary it is evident, as we have seen, that a number, and probably much the greater number, of the immediate apostles of Christ were married men and so continued during their apostolate. (See *Vow*.)

§ 3. It seems also that in the days of the apostles, the higher ministers were not only permitted but required to be married men, whose capacity to rule wisely had been already tested in their own families.

1 Tim. iii: 2, 4, 5. A bishop must be blameless, the husband of one wife, vigilant, sober, of good behavior, given to hospitality; one that ruleth well his own house, having his children in subjection with all gravity; for if a man know not how to rule his own house, how shall he take care of the church of God?

v. 12. Let the deacons be the husbands of one wife, ruling their children and their own houses well.

Tit. i: 5. For this cause left I thee in Crete that thou shouldest set in order the things that are wanting and ordain elders in every city, as I had appointed thee, if any be blameless, the husband of one wife, having faithful children, not accused of riot, or unruly; for a bishop must be blameless, as the steward of God.

§ 4. The notion that the phrase "husband of one wife" was intended to prohibit the having of more than one wife at one and the same time is merely idle. Such a prohibition would have been useless, as bigamy and polygamy were prohibited by the Roman law both in Ephesus, which was the See of St. Timothy, and in Crete, where St. Titus had jurisdiction. Moreover the phrase was never understood otherwise than as a requirement that the person should not have been engaged in more than one marriage, whether the first wife had died or been divorced. All argument on this point is superfluous to the scholar, and would fail to persuade the ignorant. (See *Second Marriages* under the impediment of *Public Decency*).

§ 5. It followed, however, that if the wife died after her husband's ordination, he was not at liberty to marry again, since he would then have been disqualified for the ministry by being the husband of a second wife; and since, in the first generation of the Christians, the superior clergy were required to be married, it was universally understood that marriage after ordination was not lawful.

Rise and Progress of Clerical Celibacy.

§ 1. When the class of monks grew in the third and fourth centuries to such numbers, the rule which required ministers to be married men was gradually relaxed; monks were permitted to be ordained for the service of their own communities, and afterwards for other congregations; and there were instances in which bishops with their clergy embraced the monastic profession after their ordination. But though vows of celibacy appear to have been unknown among monks before the fifth century (see 195), yet when monks were ordained to holy orders they were understood, equally with the married clergy, to be prohibited from marriage after ordination.

§ 2. Gradually, as virginity and celibacy prevailed, a notion that the married state is not consistent with the functions of the sacred ministry became general. At the West it was so strong that all clergymen of and above the rank of subdeacons, if they were married men, were required to abstain from intercourse with their wives; and in process of time married men were forbidden to enter the higher orders without a promise that they would separate from their wives, the wife's consent, of course, being necessary to such a promise. At the East the rule was more humane, as appears from the canons of the Trullan Council, which required none but bishops to live as celibates or to separate from wives, if they already had such; while presbyters, deacons, and subdeacons were permitted freely to cohabit with their wives, except at the times when they were about to engage in the service of the altar.

§ 3. Even at the West, however, though the legislation of councils was not only severe, but shamefully cruel in certain cases, it does not seem to have been held that the marriage of clergymen, though contrary to the laws of the church, and therefore held to be sinful, was in itself null and void. It was denounced as shameful; it was called by the vile names of *contubernium* — which was lower than legal concubinage — and *permixtio* — which is the same as indiscriminate debauchery; it was canonically punished with deprivation, and even with deposition; one council, but only one (the third of Orleans, A. D. 538), visited it with the sentence of excommunication; in certain provinces it was cruelly avenged by the perpetual imprisonment of the offender, and by the bastardizing, and even the enslavement, of his children; but it was never called void, even by Hildebrand himself, until the second Lateran Council (A. D. 1139), which, for the first time in the history of Christianity, pronounced a judgment of the church, that the marriage of bishops, presbyters, deacons and subdeacons, being manifestly forbidden by the rule of the church, is "not marriage."

§ 4. It is only necessary to observe the number, the dates, and the language of the subjoined canons, to see that no church legislation ever availed to secure general continence among the mediæval clergy. In very many cases the clergy married outright, and in England the actual marriage of priests was exceedingly common. In a large number of cases concubinage was practised; that is to say, the priests had wives to whom they were permanently bound as husbands, but without a

public and solemn celebration of their nuptials. In a frightfully large number of cases the effect of the law of compulsory celibacy was notorious and promiscuous licentiousness.

D. Canons, Decrees, etc.

243. *Ap. Can.* c. 26. Of those who have been advanced to the clergy while unmarried, we ordain that none but readers and singers shall be permitted to marry if they so will.

244. *Apost. Const. II.* 2. A bishop ought to be a man who hath been the husband of one wife who also herself hath had no other husband; and when he is to receive ordination and to be placed in his bishopric, let examination be made whether he have a grave and faithful wife, or hath formerly had such a one.

245. *VI.* 17. A bishop, presbyter, or deacon, when he is constituted, must be but once married, whether his wife be living or dead; and if he is unmarried when he is ordained he may not marry after ordination; or if married he may not take a second wife. The minor clergy are required to be but once married, but they are permitted to marry after entering the clergy. No clergyman of any rank may be married to a harlot, a slave, a widow, or a divorced woman. A deaconess must be a pure virgin, or else a widow but once married, faithful and well esteemed.

246. *Conc. Eliber.* (A. D. 305), c. 33. It is resolved absolutely to prohibit bishops, presbyters, deacons and subdeacons engaged in their ministry from cohabiting with their wives and begetting children; the which whosoever shall do let him be driven from the honor of the clergy.

247. *Conc. Neo-Caes.* (A. D. 314), c. 1. If a presbyter marry let him be removed from his order.

248. *Conc. Ancyr.* (A. D. 314), c. 10. They who have been made deacons, declaring when they were ordained that they must marry because they were not able to abide so, and who have afterwards married, shall continue in their ministry, because it was conceded to them by their bishop. But if any were silent on this matter, undertaking at their ordination to abide as they were, and afterwards proceed to marriage, these shall cease from the diaconate.

249. *Siricius, Papa*, (A. D. 385–399). Letters of this pope are extant in which he argues, at great length, that virginity and chaste widowhood are superior in sanctity to the married state, and urges that it is "meet, and chaste, and honorable for priests and levites (deacons) to abstain from intercourse with their wives."

250. *Conc. Carthag. II.* (A. D 390). It is decreed that bishops, presbyters and deacons, that is to say, whoever is employed about the sacraments, shall chastely abstain even from their wives.

251. *Conc. Carthag. IV.* (A. D. 398), c. 69. If a bishop shall knowingly ordain a clergyman who has been twice married, or who has married a widow or a divorced woman, he shall be deposed.

252. *Conc. Tolet. I.* (A. D. 400), c. 1. Presbyters or deacons who cohabit with their wives and beget children after ordination are not to be promoted.

253. *Innocent. I., Papa*, (A. D. 401–417). Epist. ad. Exuperium, cap. 2. Priests and levites must abstain from their wives.

254. *Conc. Carthag. V.* (A. D. 438). Complaint having been made that certain clerics are incontinent, although only with their own wives, it is decreed that the former statutes be observed, to wit: that such persons abstain from their wives; otherwise, let them be deposed. The minor clergy,

however, are not to be compelled to the same rule; but let the particular custom of the several churches be maintained.

255. *Conc. Arausic. I.* (A. D. 441), c. 22. Married clergy, unless they promise continence, are not to be made deacons.

256. c. 23. A deacon who does not abstain from his wife is to be deposed. c. 24. Tried men who, having been twice married, have been made clergymen, are not to be promoted beyond the grade of subdeacon.

257. *Conc. Arclat. II.* (A. D. 452), c. 2. No married man can be admitted to the priesthood unless he shall promise continence. c. 26. Clergymen marrying a second time are not to be advanced beyond the grade of subdeacon.

258. *Conc. Andegav.* (A. D. 453), c. 11. No man who is the husband of more than one wife, and she at marriage a virgin, can be made a deacon or a presbyter.

259. *Conc. Turon. I.* (A. D. 461), c. 24. Clergymen are required to abstain from their wives, and a clergyman marrying a widow is to be degraded.

260. *Conc. Roman. sub Hilario, Papa*, (A. D. 461), c. 2. Men who have been twice married, or who have married a widow or a harlot cannot be clergymen.

261. *Conc. Agath.* (A. D. 506), c. 9. Repeats a judgment of Pope Innocent I. (Epist. ad. Exup.) requiring presbyters and deacons to abstain from their wives.

262. *Conc. Epaon.* (A. D. 517), c. 2. Men who have been twice married are not to be made deacons or presbyters.

263. *Conc. Arelat. III.* (A. D. 524), c. 2. Persons who have been twice married, or who are under penance, or who have married divorced women, are not to be admitted to the priesthood.

264. *Conc. Arvern.* (A. D. 533), c. 13. Presbyters and deacons must abstain from their wives.

265. *Conc. Aurelian. III.* (A. D. 538), c. 2. No married clergyman, from a subdeacon upwards, who is forbidden by his order to contract a marriage, shall cohabit with his wife under a penalty of deposition from office and degradation to lay communion only. If a bishop, knowing him to be living in this debauchery (*permixtio*), shall afterwards admit him to office, the bishop is to be suspended for three months.

266. c. 7. Clergymen who are unmarried and of canonical age at the time of their ordination, and who were ordained of their own will and without objection on their own part, if they afterwards marry are to be excommunicated; but, if have been ordained against their own will or protest, they are to be deposed, but not excommunicated.

267. *Conc. Turon. II.* (A. D. 567), c. 8. Requires a married bishop to abstain from his wife, and on all occasions to have witnesses to his chastity of life.

268. c. 15. Requires married archpresbyters, in like manner, to have a reader or other minor clergyman with them wherever they sleep to bear testimony to their continence.

269. *Conc. Antisiod.* (A. D. 578), c 21. Forbids a presbyter, deacon, or subdeacon to sleep in the same bed with his wife, or to have connection with her.

270. *Conc. Matiscon. I.* (A. D. 581), c. 11. Clergymen of the higher orders, if they cohabit with wives whom they had before ordination are to be deposed.

271. *Conc. Lugdun.* (A. D. 583), c. 1. Bishops, presbyters, and deacons must abstain from their wives.

272. *Conc. Tolet. III.* (A. D. 589), c. 5. Married bishops, presbyters, and deacons coming over from heresy, are required for the future to abstain from their wives, not

breaking the bond of marriage, but maintaining their wives under a separate roof.

273. *Gregory I., Papa.* (A. D. 590–604), Epist. ad. August. Cant. Ep. (apnd. Bedam lib. 1, c. 27). If there are any clergymen not in the sacred orders who cannot live continent, let them take wives.

274. *Conc. Tolet. IV.* (A. D. 633), c. 7. If a person has been made a clergyman even against his own will, and has afterwards married, he is to be deprived of his ecclesiastical rank, regarded as an apostate and confined for life under penance in a monastery.

275. *Conc. Tolet. IX.* (A. D. 655). On account of the incorrigible incontinence of clergymen, it is ordained, that if children are begotten by any one of any rank, from a bishop to a subdeacon, in a detestable marriage, whether with a slave or a free woman, the offenders are to be subjected to ecclesiastical penalties, and their children are to become the slaves forever of the church which their fathers have disgraced.

276. *Conc. in Trullo.* (A. D. 691), c. 3. Clergymen who have married a second time are to be deposed if they will not separate from their wives. But if their fault was committed in ignorance of the canons, or if their wives have died, or if they are willing to separate, they are to be subjected to penance for a time, abstaining from every clerical function, but retaining their clerical rank. Clergymen who have married widows, are to be suspended for a time and must forsake their low connections, but are not promoted. For the future the Synod decrees that no man, who, after baptism, is married twice, or has kept a mistress, or married an aunt, a widow, or a divorced woman, or his father's sister, or a slave woman, or a harlot, shall be admitted to any grade of the clergy whatsoever.

277. c. 6. No clergyman of the grade of subdeacon or higher, is to marry after ordination under penalty of deposition, but below that rank they may marry if they will.

278. c. 12. Bishops, after ordination, are to abstain from their wives. The Synod denies that its decree is contrary to the spirit of the fifth apostolical canon which permits bishops to cohabit with their wives, because the apostles were not opposed to the present rule which tends to the improvement and advancement of clerical discipline, but only made a temporary concession during the weak days of the faith. Now that the preaching of the gospel has been so widely extended, bishops ought to make their lives an example of entire continence, that the ecclesiastical order may not suffer reproach.

279. c. 13. Presbyters, deacons, and subdeacons, married at the time of their ordination, are not to be separated from their wives, but they must abstain from commerce with their wives at such times as require their service at the altar.

280. c. 30. Grants dispensation to priests (*i.e.*, to bishops), in barbaric churches, who have heretofore cohabited with their wives; on condition, however, that their marital intercourse shall cease for the future.

281. c. 48. The wife of a man who is elevated to the episcopate, if she has previously consented to a separation from him, is to retire after his consecration, into a monastery at a distance from his residence. He is to provide for her there, and if she be worthy she may be made a deaconess.

282. *Conc. Ticin.* (A. D. 850), c. 1, 3, 4. Presbyters, deacons, subdeacons, and clergymen of every grade are forbidden under pain of deposition to have either wives or concubines, and the children of clergymen of any grade whatever, even by a free woman, and whether begotten in marriage or in fornication, are to be made slaves of the church

to which the father belongs, and are never to be manumitted. Furthermore, if any man shall say that children begotten by a clergyman, who is a servant of the church, on any free woman, are free, let him be anathema.

283. *Conc. Augustan.* (A. D. 952), c. 11. Bishops, priests, deacons, and subdeacons being engaged about the holy mysteries are to abstain from their wives, as has been established in many councils. And the other (minor) clergy, when they reach maturity, are to be constrained to continence even if they be unwilling.

284. *Conc. Bitur.* (A. D. 1031), cc. 5, 6. No presbyter, deacon, or subdeacon shall have a wife or a concubine, and before a man is ordained subdeacon, he must promise that he will have neither wife nor concubine.

285. c. 10. If a man who has been admitted to any grade of the clergy returns entirely into the lay order, and takes a lawful wife, and is afterwards restored to the clergy, his children are legitimate, since they were begotten in the lay order and in lawful marriage. And if the man remains among the laity, the same rule holds.

286. c. 19, 20. No man shall give his daughter in marriage to a presbyter, deacon or subdeacon, and no man shall marry the daughter of a presbyter, deacon or subdeacon.

287. *Conc. Tolos.* (A. D. 1056), c. 7. Presbyters, deacons, and the other clergy are required altogether to abstain from wives, and from other women, under penalty of deposition and excommunication.

288. *Conc. Roman. sub Nicol. II., Papa.* (A. D. 1059), c. 3. If any presbyter, deacon, or subdeacon shall marry a concubine, or not leave one whom he has married, he is utterly forbidden to sing mass or to read the gospel or epistle.

289. A Council of Rome held under Gregory VII. (Hilde-

brand), A. D. 1075, re-enacted the previous rule, with the explanation that it was not because the sacraments of such priests were invalid, but in order that they might be brought to their senses through respect for the world and by the reproach of the people.

290. *Conc. Lateran. I.* (A. D. 1123), c. 3. We utterly forbid presbyters, deacons, and subdeacons to live with concubines and wives; and we forbid their having any woman in the house with them except those whom the Council of Nicæa allowed on the ground of relationship, namely, sister, mother, aunt, and so on, about whom no suspicion can fairly arise.

291. *Conc. Lateran. II.* (A. D. 1139), c. 6. We decree that persons of the order of subdeacon or above it, who have married wives or kept concubines, shall be deprived of all ecclesiastical office or benefice; for when they themselves ought to be the temple and vessels of the Lord, and sanctuaries of the Holy Ghost, it is unseemly that they should be given to bed-work and uncleanness.

292. c. 7, 8. In order that the law of continence and that a purity pleasing to God may be promoted among ecclesiastical persons and in holy orders, we have decreed that bishops, presbyters, deacons, subdeacons, regular canons, monks, and professed religious who have transgressed their sacred purpose and have coupled themselves with wives, shall be separated from them; for such copulation which is manifestly contracted against the rule of the church, we judge not to be marriage. They who are thus separated from each other, for offences so great, shall undergo an appropriate penance. And we decree that the same rule shall hold in the case of nuns if they attempt to marry which may God forbid.

293. *Alexand. III., Papa* (A. D. 1159–1181), Ad Salern.

Archiep. We desire that you should not require clergymen who keep concubines in their own houses without concealment to swear that they will abstain from them, lest they should return to them again, and so incur the guilt of perjury. You ought rather to constrain them by sentence of suspension, and interdict to put the women away; and then if they return to the women or take others, you ought to pronounce upon them a sentence of perpetual excommunication, that others may be deterred from a like offence. If any of the clergy below the subdiaconate have taken wives, you are to deprive them of their benefices, if such they have, and require them by ecclesiastical measures to keep their wives; but if any of the subdiaconate or of the superior orders are found to have taken wives, they must put away their wives and do penance for their crime (*commisso*); and this you are to require under penalty of suspension and excommunication.

294. *Idem ad cantuar. Archiep.* Forasmuch as in England a depraved and detestable custom has prevailed for a long time, whereby clergymen keep lewd women (*fornicarias*) in their houses, we desire to remove this gross scandal, and to bring back such clergymen to the honorable way of living which the church requires; and by our apostolic precept we require you to admonish all clergymen of the grade of subdeacon and upwards, who keep such women, to put them away without delay or appeal, and not to take them back again. And if, within forty days after your admonition, they do not obey, then you are to suspend them from their benefices for a sufficient time; and if they shall keep the women after their suspension they are to be permanently deprived.

295. *Idem ad Eborac. Archiep.* If the presbyter, A., who, you say, has been suspended from office for keeping a lewd woman (*fornicariam*), shall make an appeal to us,

we shall chastise his contumacy as shall seem to be convenient; but if he do not appeal, we will that his sentence of suspension continue until he shall have put the woman away, and shall live as becomes a presbyter, in continence.

296. *Idem ad Londin. Ep.*. If clergymen in your jurisdiction, whether they are in holy orders or only in the lower orders, keep lewd women, you are to admonish them a first, second, and third time, and if they will not then put the women away and promise that for the future they will abstain from them, you are to deprive them of office and benefice.

297. *Constitutions of Stephen Abp. Cant.* (A. D. 1222). Beneficed clergymen and men in holy orders are forbidden under penalty of deprivation to keep concubines in their own houses or to associate with such elsewhere.

298. *Constitutions of Richard Abp. Cant.* (A. D. 1230). Clergymen under the grade of subdeacon, if they marry, are not to be separated from their wives unless both parties embrace the monastic life, but if they remain with their wives they must surrender their ecclesiastical benefice.

299. *Decretals of Gregory IX.* (A. D. 1230), III. 3: 1. The marriage of a clerk in holy orders is not valid; in minor orders otherwise, but in the latter case he must separate or forfeit his benefice. [Alexander III., A. D. 1159–1181.]

300. III. 3; 2. A married man may not be promoted to any ecclesiastical administration, order, or benefice unless he promises continence. [Idem.]

301. III. 32; 5, 6. A married man is not to be promoted to a bishopric nor to any of the sacred orders unless his wife promises to observe continence. [Innocent III., A. D. 1198–1217.]

302. *Constitutions of Otho, Cardinal Legate.* (A. D. 1237). Persons who have contracted secret marriages and afterwards obtain promotion to holy orders and receive benefices are to

be deprived, and any goods they may have received are to be restored to the church. Incontinence being a great blemish to the church, the decree of Pope Alexander requiring the concubines of clergymen to be put away must be observed under penalty of suspension from office and benefice.

303. *Conc. Trid.* (A. D. 1563), Sess. xxiv. c. 9. If any man shall say that clergymen in holy orders, or regulars who have solemnly professed chastity can contract marriage, and that the marriage, if contracted, is valid notwithstanding the ecclesiastical law or the vow; and that to maintain the contrary is nothing else than to condemn marriage; and that all who do not feel that they have the gift of chastity can marry even if they have vowed chastity; let him be anathema, for God denies not that gift to them that rightly seek it, neither does he suffer us to be tempted beyond that we are able.

Scholia.

[For the sake of convenience the following abbreviations will be used in these scholia: B for bishop, P for presbyter, D for deacon, S for subdeacon, M for clergymen in minor orders, C for the clergy in general without distinction of rank.]

1. Of marriages particularly forbidden to the clergy we observe: —

a. That digamists were excluded from C; 244, 245, 251, 258, 262, 263, 378, 390;

b. Also men who had married women who were not virgins or women who were liable to suspicion; 244, 255, 251, 258, 260, 263, 276, 379, 390.

c. Tried men twice married were not to be promoted, at furthest, beyond the degree of S; 256;

d. But if S married he was degraded to reader; 388.

e. C married to a widow was degraded; 259;

f. By the Greeks he was laid under penance and not promoted; 276.

g. A reader marrying a widow, was not to be promoted at furthest beyond S; 387;

h. And if he were made D, his ordination was void; 397.

i. C marrying a widow, a divorced woman, or a harlot without license from the bishop, was to be separated from her; 398.

2. Of the abstinence required of married clergymen:—

a. It was not always nor in all parts, even of the west, required of any of the clergy, though such abstinence was considered "honorable;" 249.

b. The Eastern rule was of slow growth, and was at last formulated in the Trullan Council, which forbade bishops to cohabit with their wives, but left the other orders free except at the time of their ministration; 278, 279, 281.

c. At the West B was required to abstain from conjugal intercourse, and to have witnesses of his continence; 267;

d. Also an archpresbyter; 268.

e. The rule of abstinence extends to P and D; 250, 254, 261, 264, 271, 272;

f. Under penalty of deposition; 254, 256, 270;

g. At least they are not to be promoted; 252.

h. It extends to S; 246, 253, 269;

i. Under penalty of deposition; 265, 277; 291.

k. It includes C; 259, 282.

l. No married man may hold any ecclesiastical office or function without a promise of continence; 300;

m. And if he would enter B, P, D, S, his wife also must promise continence; 301.

3. Of the marriage of clergymen after ordination:—

a. M may marry; 273;

b. But none above reader or singer; 243, 282.

c. B, P, D are forbidden to marry; 245, 247;

d. Under penalty of deposition; 247, 248, 266;

e. And none are to be ordained without a vow of continence; 257.

f. D ordained declaring that he cannot contain, and marrying afterwards, is not deposed; 248.

g. Elsewhere any C, though ordained by force, is to be deposed, if he marries, not excommunicated; 266.

h. But Spanish cruelty condemns him to be deposed, regarded as an apostate, and imprisoned for life; 274.

i. The prohibition of marriage after ordination expressly includes S; 265, 283, 284, 286, 288, 290.

4. Of the children of clergymen of all ranks: —

a. However begotten, they are to be slaves of the church forever; 275;

b. And never to be manumitted, 282.

5. Of the doctrine of clerical celibacy: —

a. The marriage of clergymen from S upwards is "not marriage;" 292;

b. It is "not valid;" 299.

c. To maintain the contrary is heresy; 303.

E. Anglican Reformation.

§ 1. By 1 Henry VII. (A. D. 1485), cap. 4. Bishops and other ordinaries having Episcopal jurisdiction are authorized to punish incontinent priests, clerks, and religious men with imprisonment.

§ 2. By 31 Henry VIII. (A. D. 1539), cap. 14, and 32 Henry VIII. cap. 10 (A. D. 1540), a married priest continuing to keep his wife is to be deemed and

adjudged guilty of felony, and to be punished accordingly. If he keep a concubine he is to forfeit his goods and chattels, and suffer imprisonment during the king's pleasure.

§ 2 Edward VI. (A. D. 1548), cap. 21, sets forth the advantages of voluntary chastity in the clergy, but acknowledges the evils of compulsory celibacy, and therefore, enacts that all laws and canons forbidding the marriage of ecclesiastical persons of any degree whatsoever shall be void, and all forfeitures for marriages previously contracted are set aside.

§ 4. In 5, 6 Edward VI. (A. D. 1551), cap. 12, the previous act is recited; and it is said evil-disposed persons had misconstrued it as if the act had granted permission to the clergy to do what is not lawful, so that notwithstanding the law, the children of clergymen are bastards, to the dishonor of Parliament and convocation by whom the statute was made, and to the slander of the clergy and the discouragement of learning. It is, therefore, declared that the matrimony of priests is lawful; that their children are legitimate; that a clergyman is tenant by courtesy of lands belonging to his wife; and that his wife has right of dower in lands which belong to him in fee simple.

§ 5. Article xxxii. (39 Articles), (A. D. 1562). Bishops, priests, and deacons are not commanded by God's law either to vow the estate of single life or to abstain from marriage. Therefore, it is lawful for them, as for all other Christian men, to marry at their own discretion, as they shall judge the same to serve better to Godliness.

XV. THE IMPEDIMENT OF CRIME.

The impediment of crime is exclusively ecclesiastical, and was manifestly intended to prevent incest, adulterous contracts, and murder. The canons relating to this impediment are given below: —

Canons, Decrees, etc.

304. *Conc. Eliber.* (A. D. 305), c. 72. If a widow has committed adultery with a man whom she shall afterwards marry, she shall be restored to communion after five years of regular penance. If she shall leave him and marry another man, she shall be denied communion even at her death; and if he whom she marries is a Christian he shall not receive the communion before he has fulfilled ten years of regular penance, unless grievous sickness require that the communion be sooner given.

305. *Conc. Vermer.* (A. D. 753), c. 2. If a man commit sin with his step-daughter, he shall not afterwards have carnal knowledge either of her or of her mother; nor shall he or his step-daughter be able to contract marriage with any person, or at any time whatsoever. But if the wife, having no carnal commerce with her husband shall not be able to contain, or if she is not willing to abstain, she may marry.

306. c. 5. If a man's wife enter into a conspiracy to murder him, and he kill one of the conspirators in self-defence, he may put her away. (Later copies add that after the death of his wife he may marry again, but that the wife is to be subjected to penance and may never marry.)

307. c. 10. If a man defiles his father's wife, neither of the guilty parties shall be allowed to marry. The father may take another wife if he will, but it is better to abstain.

308. c. 11. The same rule is to hold if a man has defiled his step-daughter or his wife's sister.

309. c. 12. If a man has slept with two sisters, one of whom has previously been his wife, he shall afterwards have neither of the two, and neither the adulterer nor the adulterous sister shall ever be permitted to marry.

310. c. 13. He who stays with his wife's cousin, shall lose his wife and have no other. His wife may do what she will.

311. *Conc. Compend.* (A. D. 772), c. 7. If a man who has taken a wife finds that she has been defiled by his brother, and when he has married again discovers that his second wife has also been corrupted, she is his lawful wife nevertheless, because he himself was not a virgin when he took her. And if he has subsequently taken a third wife, he shall return to the second, but the third shall be at liberty to marry again.

312. c. 8. If the wife of any man have committed adultery with the husband's brother, neither of the guilty parties shall afterwards marry; but the husband may marry another, if he will.

313. c. 10. If a father has violated (*oppresserit*) the betrothed of his son, and the son has afterwards married her, the father shall not afterwards have a wife; and the woman shall not have a husband, because she did not tell that the father had stayed (*mansisset*) with her; but the son who has married her in ignorance, may take a lawful wife.

314. c. 14. If a man has committed adultery with a mother and daughter, neither of the women knowing of his connection with the other, the man shall never marry till the day of his death; and if he have married he shall put away his wife. But the wife whom he thus put away may marry again. The mother and daughter who were ignorant of the double sin may marry; but if they knew of it they must put away their husbands and submit to penance; and their husbands may take other wives.

315. c. 15. Likewise of two sisters, if a man has stayed with one of them and publicly taken the other, he shall not have a wife till the day of his death; and the sisters, if they were ignorant of the facts, may marry; but if they knew, the rule of the previous canon is to be observed.

316. *Conc. Meld.* (A. D. 845), c. 69. If a man has married a woman with whom he had previously committed adultery during the lifetime of her former husband, they shall do public penance, but they may afterwards live together if it seem expedient so to do, unless either the man or the woman has murdered the former husband, in which case they must separate, and never marry again, but remain under penance as long as they live.

317. *Conc. Mogunt. II.* (A. D. 847), c. 20. Marriage is forbidden to parricides.

318. *Conc. Wormat.* (A. D. 868), c. 33. If any layman has committed fornication with two sisters, or with persons concerning whom there is a (particular) prohibition of Holy Scripture, he should do due penance, and then, if he cannot contain, he may take a wife in lawful wedlock. The like rule is to hold in the case of the woman, not being a consecrated nun or widow, who shall fall into a like sin (*quæ tali fuerit scelere lapsa*), so that she fall not into a chaos of fornication.

319. *Conc. Tribur.* (A. D. 895), c. 40. It has been related that a certain man defiled the wife of another man, and, during the life of her husband, swore to her that when the lawful husband should be dead, he would take her as his wife; and that the thing was so done. Such a marriage we condemn and anathematize.

320. c. 43. In the absence of a certain man's wife, his sister went into his bed; and he, supposing her to be his wife, had carnal knowledge of her. In this case it was held that the man should be permitted to retain his lawful wife,

but that the sister should be severely punished, and forever barred from marriage.

321. c. 44. A certain man committed fornication with a woman; his son, in ignorance of the fact, also had to do with her; and his father, learning what had happened, confessed his sin. It was held that the father and son had better be permitted to marry, after penance; but that the woman should be barred from marriage forever.

322. c. 45. He who has married two sisters shall be under penance, and shall observe continence to the end of his life; and the sister who has committed lewdness with him, knowing of his former connection with her sister shall undergo the same sentence.

323. c. 51. If any man have committed fornication with another man's wife, the judgment of the Synod is that he shall not marry the woman after her husband's death; for we forbid, as contrary to the Christian religion, that any man shall cohabit with a woman in marriage whom he has polluted in adultery.

324. *Conc. Altheim.* (A. D. 916), c. 1. Is identical with the fortieth canon of Tribur.

325. *Conc. Rotomag.* (A. D. 1072), c. 16. It is forbidden that any man who, in his wife's lifetime, has slanderously accused a woman of adultery, shall ever, after his wife's death, marry the woman whom he has slandered; for many misfortunes have arisen from such a cause, and many men have slain their wives on account of it.

326. *Decretals of Gregory IX.* (A. D. 1230), III. 33; 1. A man cannot marry a woman whose husband he has slain by the wife's contrivance; but otherwise (*e.g.*, if he had killed the husband in battle, without any contrivance on the wife's part), he may lawfully marry her. [Celestine III., A. D. 1191–1198.]

327. IV. 7; 1, 7. If any man, during the lifetime of his wife, marries another woman who is ignorant of his former marriage, then if the first wife dies, he shall not be allowed to separate from the other (under the pretext that his marriage to her was illegal). [Alexander III., A. D. 1159–1181, and Innocent III., A. D. 1198–1216.]

328. IV. 7; 3. A man cannot marry a woman whom he has carnally known during a former wife's lifetime, if she in any way plotted against his wife's life. [Alexander III.]

329. IV. 7; 4, 5. If a man, during the lifetime of his wife, even if he was separated from her (*i.e.*, *a mensa et thoro*, or "from bed and board," but not absolutely divorced from the bond of marriage), has married another woman who knew him to be a married man, then, even after the death of the first wife, he shall be separated from the the woman; but he may marry another. [Clement III., A. D. 1187–1190.]

330. IV. 7; 6. If any man, after the death of his wife, marries a woman of whom he had carnal knowledge during his wife's lifetime, the marriage stands, provided that there was no contract made between them at the time of their adultery, and that they did not plot against the life of the first wife. [Innocent III.]

331. IV. 7; 8. If a man, during his wife's lifetime, promises another woman that he will marry her after his wife's death (he commits a great sin, but) if he had no carnal knowledge of her, either before or after his promise, and if he marry after his former wife is dead, the second marriage is not to be broken. [Gregory IX.]

SCHOLIUM.

In the foregoing canons we observe: —

a. That the Council of Elvira permitted a woman who had

committed adultery to marry her paramour, but forbade her marriage with any other under penalty of perpetual excommunication; 304.

b. It is a remarkable fact, to be remembered in considering the dissolution of marriage, that so many canons, by permitting the second marriage, of innocent parties, allow that marriage is dissolved by incest when the incest is such as to create affinity between the married persons; 305, 307, 308, 309, 310, 311, 312, 313, 314, 315, 320, 321, 322;

c. But incestuous fornication does not prohibit the marriage of the guilty party; 318;

d. But if others are betrayed into incest ignorantly, the person who sinned knowingly cannot marry; 320, 321.

e. The case mentioned under 320 was adulterous incest, as well as a fraud upon others; but the guilty party being alone responsible was alone prohibited from marriage.

f. A man who has polluted a woman in adultery during her husband's life is stringently forbidden to marry her; 323;

g. But the marriage actually contracted was not void; 316;

h. Unless at the time of the adultery there was a contract to marry after the husband's death; 319, 324, 330;

i. And a bigamist, after his lawful wife's death, was required to retain as his wife the innocent woman whom he had deceived; 327;

k. But if the second wife knew of his first marriage, her marriage is void; 329.

l. A promise to marry a woman, given during a previous marriage, does not forbid the marriage of the parties after the wife's death, unless they had carnal knowledge of each other in adultery; 330;

m. But any conspiracy to murder a husband or wife with a view to marriage, forbade the marriage; 306, 316, 326, 328.

n. Parricides were altogether barred from marriage, and the word included either children who killed their parents, or parents who killed their children; 317.

o. It appears incidentally that ante-nuptial fornication was sufficient cause for a divorce; 311.

p. The curious prohibition of marriage between a woman and her slanderer is rather curious than important; 325.

V. IMPEDIMENT OF VIOLENCE.

§ 1. If a person is constrained to consent to a marriage by such violence or threat of violence as would invalidate any other contract, it is conceded that the marriage contract is void, unless the objection is waived by the injured party subsequently acquiescing in it. The Christian doctrine that freedom of consent is of the essence of marriage is so universally admitted in Christian countries, that it is almost forgotten that neither under the Hebrew law nor under the ancient law of Rome did the same doctrine prevail.

A. The Hebrew Law.

§ 1. In the patriarchal age parents married their children as they thought best. Thus Abraham, through his servant Eliezer, obtained Rebekah to be the wife of Isaac (Gen. xxiv), though neither of them had any knowledge of the other. In like manner Hagar (Gen. xxi:21) took a wife for Ishmael out of the land of Egypt. Less specifically, but yet really, Isaac controlled the marriage of Jacob (Gen. xxviii:1, 2); his uncle Laban disposed of his daughters in absolute freedom (Gen. xxix:15–28), as Judah seems to have done afterwards with his first-born son Er (Gen. xxxviii:6).

§ 2. The Mosaic law recognized, but neither changed nor modified the patriarchal custom. Jethro, the father-in-law of Moses, seems to have given Zipporah to be the wife of Moses as freely as Laban had given his daughters to Jacob (Exod. ii:21). Caleb afterwards offered his daughter as the prize for a dangerous and difficult exploit (Judges i:12, 13). Ibzan, the judge, having many sons, "sent and took daughters from abroad" for them (Judges xii: 9). Samson's father-in-law disposed of his daughter, even after she was Samson's wife (Judges xv: 1, 2). Saul offered his daughter to any man who should kill Goliath of Gath (1 Sam. xvii:25); another daughter, Merab, was promised to David in consideration of certain services (1 Sam. xviii:17), but she was withheld, and her sister Michal was substituted in her stead (19–27).

§ 3. The law of the Levirate, already treated under Affinity, absolutely required a surviving brother to marry the widowed sister-in-law without regard to the wishes of either party.

§ 4. It is true, as might be supposed, that parents often consulted the wishes of their children, and acted by their request; thus Hamor acted by the request of his son Shechem (Gen. xxxiv:4, 8), as Manoah did for Samson (Judges xiv:1–4); and the will of the woman was certainly not always constrained (Gen. xxiv:5, 8); but yet, by the law, the father might "utterly refuse" (Exod. xxii:17); if the marriage took place he said, "I *gave* this man my daughter" (Deut. xxii:16); and the general language of the law

lays upon parents the responsibility of their children's marriages (Neh. xiii:25).

§ 5. In connection with this subject, however, it is to be remembered that the seclusion of women, which the custom of Eastern countries requires, rendered an intelligent choice of a husband or wife by the parties themselves impossible in all ordinary cases, so that a choice made by their parents was likely to be wiser than their own; and when it so chanced that a personal preference had been formed, we may suppose, from the cases of Shechem and Samson that parents were disposed to gratify it.

§ 6. It must also be remembered, that when the parties to a marriage did not personally know each other until the time of their nuptials, there could usually be no personal repugnance on either side; and as repugnance to marriage itself seems never to have been exhibited by the Hebrews of either sex, passive consent, at least, may be assumed to have been generally given by the parties to a marriage.

B. The Roman Law.

§ 1. The power of parents over their children was as absolute as over their slaves. Indeed, a father might sell his child into slavery, and if he were manumitted by his master he returned again into the power of his father. Only by selling him a second and a third time could the father alienate his power over his child, and then the child suffered degradation (*diminutio capitis*) from his former rank to that of a freedman (*libertus*). Under such a law, it is evident that the

marrying of children was the absolute right of parents; and that any marriage contracted without their consent was necessarily void. This rule was maintained without relaxation under the Christian emperors; and a law of Constantius and Constans (about A. D. 345), made a clandestine marriage, without the consent of parents, a capital crime.

§ 2. Nevertheless, since the seclusion of women was not practised by the Romans, personal affection must have been much more influential in causing marriages among the Romans than among the Hebrews; and it is to the credit of Roman character that the abuse of parental power in constraining the choice of children was so rare that it became a legal maxim, that *ex affectu omnes introducuntur nuptiæ*, *i.e.*, all marriages are brought about by affection (Cod. Just. lib. V. tit. 4, leg. 26).

C. The Law of The New Testament.

§ 1. In the New Testament we find nothing which expressly requires that the consent of the parties to a marriage shall be necessary to its validity; only those precepts of humanity and charity which would prevent cruelty or tyranny of any kind, and such general instructions to parents as would make them mild and considerate in all their dealings with their children.

§ 2. Our Saviour in his discourse assumed that "marrying and *giving* in marriage" (Matt. xxiv: 38, 39), would continue to be the usual course of things as it had been since the days of Noah; and St. Paul in 1 Cor. vii: 36–38 (see above under *Vow*), assumed

(what was only the fact) that daughters were under the absolute control of parents, and were to be married or not as the parents thought best. Widows he seems to have considered free to marry at their own discretion (1 Cor. v:11), though long afterwards (about A. D. 380), a law of Valentinian and Gratian still forbade widows under twenty-five to marry without the consent of her parents.

§ 3. It is not surprising that the early fathers, educated as St. Basil was, under the laws of Rome, and guided by the teachings of St. Paul, should have held that the marriage of a child without the consent of her parents (see 117, 118), is not marriage but fornication, unless and until their consent is obtained. But in no Christian writing has it ever been maintained, that a forced marriage, made against the will of either party is valid.

§ 4. On the contrary, every utterance of the church on this subject declares a marriage contracted without the consent of either party, or with a consent extorted by violence, is void.

§ 5. At the same time, every allegation of violence is not to be rashly admitted.

§ 6. And it must be remembered that consent to a marriage is satisfactorily ascertained if there is voluntary cohabitation after the contract, whatever allegation there may be of violence or constraint before it.

The following canons, etc., will require no further comment; and the following may be consulted with advantage, 161, 358.

D. Canons, Decrees, etc.

332. *S. Ambrosius* (A. D. 333–397), De Inst. Virg. c. 6. Not the deflowering of virginity, but the conjugal agreement (*pactio conjugalis*), makes a marriage.

333. *Conc. Tolet. III.*, (A. D. 589), c. 10. Widows who are so minded may profess chastity; but before they have actually made the vow of chastity they may marry whom they will; and they are not to be compelled to marry. The same rule holds in the case of virgins.

334. *Conc. Compend.* (A. D. 772), c. 8. If any man shall give his free-born stepdaughter in marriage against her own will and the will of her mother and her other relations, whether he give her to a free man, or a slave, or an ecclesiastic, if she refuse the man and abandon him, her relations have the right to give her another husband; and if she herself take another, they shall not be separated.

335. c. 6. Recites the case of a vassal who was constrained by his lord to marry a woman of the estate where he was; the vassal afterwards deserted the woman, with whom he had lived for a time, and married another. The decision is that he shall retain the latter as his wife.

336. *Nicolaus I.*, *Papa* (A. D. 858–867), Ep. ad Bulgar; c. 3. Concerning those whose unions are in question, let consent alone suffice according to the laws. For if consent alone be wanting in a marriage, every thing else connected with it, though followed by actual carnal copulation, is in vain.

337. *Gratian.* (A. D. 1151), Decr. Pars. II. Caus. xxix. q. 1. The consent of the parties makes the marriage. But two kinds of consent are possible, — previous and subsequent. Previous consent is given when both parties agree to a conjugal union before carnal copulation

takes place; subsequent consent is given when the same agreement is made after intercourse has been enjoyed. Jacob and Leah became husband and wife by the consent given after he had slept with her, supposing her to be Rachel.

338. *Decretals of Gregory IX.* (A. D. 1230), IV. 2; 9. Of whatsoever age persons may be, they may demand to be released from a marriage to which they were constrained by force, unless they afterwards consented. [Alexander III., A. D. 1159–1181.]

339. IV. 1; 6. Force does not always vitiate a marriage (*e.g.*, if there is subsequent consent), and there are different kinds of force. [Idem.]

340. I. 1; 21. A marriage contracted by force becomes valid by voluntary cohabitation. [Clement III., A. D. 1187–1190.]

341. IV. 1; 25. Marriage is contracted by the sole consent of the parties; but words are required as evidence of consent, or at least signs which are equivalent to words (as in the case of deaf-mutes). [Innocent III., A. D. 1198–1217.]

342. IV. 1; 28. A woman is not to be believed, if she denies that she consented to her marriage while the man proves the contrary; but it is otherwise if she proves that she consented under such fear as might constrain a brave man. [Honorius III., A. D. 1216–1227.]

243. *Conc. Trid.* (A. D. 1563), Sess. xxiv, de Reform. Matr. c. 9. Worldly aims and covetousness frequently so blind the eyes of temporal lords and magistrates that they use threats and penalties to compel men and women residing in their jurisdiction, especially if they are rich or have the prospect of a great inheritance, to contract marriages against their own will with persons chosen by such temporal lords and magistrates themselves. Wherefore, since it is in the

last degree nefarious to violate the liberty of marriage, and that such wrong should be done by those from whom justice is to be expected, the holy Synod commands all men, of whatsoever rank, dignity, or condition they may be, and under pain of anathema which they shall incur *ipso facto*, to use no constraint direct nor indirect, by which persons under their power shall be deprived of freedom in contracting marriages.

E. Anglican Reformation.

§ 1. Long before the Reformation the formularies of the Church of England required unequivocal evidence of the consent of the parties to a marriage. Thus, in the York use we find the following order in the solemenization of matrimony (Blunt's Annotated B. C. P. p. 265.)

Then shall the priest in the hearing of all present say in the mother tongue: —

N. Wylt thou have thys woman to thy weddyd wyf and her loue, honour, holde, and kepe heyl,[1] and syke[2] as a housbonde owyth[3] to kepe hys wyf and all other for her to lete[4] and holde the only to her as long as your eyther lyf lasteth?

And the man shall say: —

I wylle.

The priest shall say to the woman also, after this manner: —

N. Wylt thou have thys man unto thy housbonde, and obeye to hym and serve and hym to love and honour and kepe heil, and syke as a wyf owyth to do the housbonde

[1] Whole, well.
[2] Sick.
[3] Ought.
[4] Leave, forsake.

and to lete alle other men for hym and holde the only to him whylys your eyther lyf lasteth?

And the woman shall say: —

I wylle.

§ 2. In this respect the Anglican Church changed nothing at the Reformation except the form of words in which the expression of consent is made. The formula has always been and still is as follows: —

N. Wilt thou have this woman to thy wedded wife, to live together after God's ordinance in the holy estate of matrimony? Wilt thou love her, comfort her, honor and keep her in sickness and in health, and, forsaking all other, keep thee only unto her, so long as ye both shall live?

I will.

N. Wilt thou have this man to thy wedded husband, to live together after God's ordinance in the holy estate of matrimony? Wilt thou obey him and serve him, love, honor, and keep him in sickness and in health, and, forsaking all other, keep thee only unto him, so long as ye both shall live?

I will.

§ 3. *Canons of 1603*, Can. 62. Whether banns are thrice asked or license is given to marry without banns, the consent of the parents or governors of persons to be married, being under the age of twenty and one years, shall be necessary.

VI. ABDUCTION.

A. B. Hebrew and Roman Law.

§ 1. In the Hebrew law there is no mention of the crime of abduction, but the seducer of a virgin not be-

trothed was required to marry her and to pay a fine to her father (Exod. xxii: 16; Deut. xxiii: 28, 29); but the father might refuse to give her to him, and in that case the fine was paid as a dowry to the girl (Exod. xxii: 17).

§ 2. The forcible abduction of women, generally heiresses, for the sake of property, was a crime against liberty which prevailed under the Roman empire and throughout the middle ages. The consent of the woman herself did not diminish the violence done to the rights of parents or guardians and to the laws of the land. By a law of Constantine and Constantius, abductors of women were to be put to death; and by a law of Justinian it was forbidden that the abductor should ever become the lawful husband of his victim.

Cod. Justin. lib. ix. tit. xiii. Abductors of honorable or free born virgins, whether betrothed or not, or of any widow women, though they be freed-women or even slaves of another man, shall be punished with death; and especially if sacrilege is committed against Almighty God by the abduction of consecrated virgins or widows, and by the violation of virginity or chastity which cannot be restored, the abductors are to be regarded as murderers.

1. If the abducted woman is a slave or a freedwoman, the abductor is to suffer death only, but if she is free born, the entire property of the abductor and his accomplices is to be given to her.

2. And the abducted woman shall have no power to have the abductor as her husband, but she shall marry such man, the abductor excepted, as her parents shall choose, for we will never in any way permit any persons in our state to contract a marriage in a hostile manner. Whoever would marry

a wife, whether she be a freed-woman or free born, must obey our laws and the ancient customs by asking her parents or others, as the case may require, and so let the marriage be made with their consent.

D. Canons, Decrees, etc.

344. *Ap. Can.* 67. If any man shall force a virgin who is not betrothed, let him be suspended; and let him take no other wife, but keep her whom he has chosen, though she be poor.

345. *Conc. Ancyr.* (A. D. 314), c. 11. It is decreed that virgins who have been betrothed and who have afterwards been carried off by others, shall be restored to those to whom they had formerly been betrothed, even though they may have suffered violence from their ravishers.

346. *S. Basil.* (A. D. 370), c. 22. They who carry off virgins and refuse to restore them, are to be treated as fornicators. If a virgin so carried off is restored to a man to whom she has been betrothed, it is at his discretion to marry her or not; and if she is restored to her guardians, it is at their discretion to give her in marriage to the raptor or not.

347. *Conc. Chalced.* (A. D. 451), c. 27. Persons who abduct women under pretence of marriage, and the aiders and abettors of such ravishers, shall be degraded if they be clergymen; and, if they be laymen, they shall be anathematized.

348. *Conc. Aurelian. I.* (A. D. 511), c. 2. If a man abduct a woman, and take refuge with her in a church, and if it appears that the woman has been violated, she shall be forthwith delivered from the power of the abductor. And the abductor shall not be put to death, but he shall either be reduced to slavery or permitted to redeem himself.

349. *Conc. in Trullo.* (A. D. 691), c. 92, is a verbal repetition of the twenty-seventh canon of Chalcedon.

350. *Conc. Vern. II.* (A. D. 844), c. 6. The eleventh canon of Ancyra is to be observed; and abductors who mind not the law of the church are to be restrained by the severity of secular law.

351. *Conc. Meld.* (A. D. 845), c. 65. If a man does not marry a woman whom he has abducted, he shall not afterwards be permitted to marry her until he has done penance; and after her death, he shall not marry again.

352. c. 67. Persons who abduct or marry (*ducentes*) a nun, shall never be permitted to marry.

353. *Conc. Ticin.* (A. D. 850), c. 10. Widows or betrothed women shall never be the legitimate wives of men who have abducted them.

354. *Conc. Wormat.* (A. D. 868), c. 77, repeats the twenty-seventh canon of Chalcedon,

355. *Decretals of Gregory IX.* (A. D. 1230), V. 17; 6, 7. The crime of abduction is not committed when a woman is carried off with her own consent in order to marry. But when the crime of abduction has been actually committed, the woman may marry her abductor, if she does so of her free choice. [Lucius III., A. D. 1181–1185, and Innocent III., A. D. 1198–1216.]

SCHOLIUM.

a. By the apostolical canons, the violator of an unbetrothed virgin is required to marry her, 344;

b. But St. Basil leaves it to parents' discretion: 346.

c. A betrothed virgin must be returned to the man to whom she was betrothed, 345, 350;

d. But it is at his discretion to receive her; 346.

e. An abducted woman may marry her abductor if she freely chooses, 355;

f. But the abductor must do penance and may never marry another woman, 351;

g. And if the woman were a widow or betrothed he may never marry her, 353;

h. If she were a nun he may never marry at all.

i. The discipline of an abductor was suspension, 344, for the term of a fornicator, 346; later the sentence of anathema, 347, 349, 354; the First Council of Orleans condemned him to slavery, with the right, however, of redemption, 348; and the secular arm was invoked to punish the crime, 350.

E. English Reformation.

§ 1. The abduction of heiresses was punished by the laws of England with the utmost severity.

§ 2. By 3 Henry VII. cap. 2, the abduction of an heiress against her will, and marrying or violating her, was made a felony.

§ 3. In all subsequent acts of General Pardon, from 18, 23 Eliz. to 5, 6 William and Mary, "all ravishments and wilful taking away or marrying of any maid, widow, or damsel against her will or without the assent or agreement of her parents, or such as then had her in custody," are expressly excepted.

§ 4. By 39 Eliz. cap. 9, it was enacted, that whereas the crime of abduction, as described and declared to be a felony by 3 Henry VII., cap. 2, had of late times been frequently committed, the penalty thereafter should be death without benefit of clergy.

§ 5. Under the head of *Violence* it has been seen that the Reformed Church of England provided for the expression of the free consent of the parties at the

celebration of every marriage, and in 1603 the following canon passed by the convocation of Canterbury, was made the law of England by 1 Jac. I.

§ 6. Canons of 1603, c. 100. No children under the age of one and twenty years complete, shall contract themselves or marry, without the consent of their parents, or of their guardians or governors, if their parents be deceased.

§ 7. The many precautions taken by church and state to prevent secret marriages, and so indirectly to make marriage after abduction generally impossible, may be found under the head of *Clandestinity*.

XVII. THE IMPEDIMENT OF ERROR.

The impediment of Error requires no illustration beyond that given below from Gratian; 358.

The following canons bearing on the *error of condition* may be consulted; 123, 126, 127, 131, 132.

Canons, Decrees, etc.

356. *Conc. Vermer.* (A. D. 753), c. 6. If a free man have married another man's slave, believing her to be free, and the woman be afterwards found to be a slave, let him redeem her, if he can; but if he cannot, he may marry another, if he will. The same rule is to hold of a free woman ignorantly marrying a man who is a slave.

357. *Conc. Bavaric. apud Dingolfind.* (A. D. 772), cc. 9, 10, enacted that if a slave married a woman of noble birth who was ignorant of his condition, she should leave him and be free to marry another. Likewise of a free Bavarian woman ignorantly marrying a serf of the church.

358. *Gratian.* (A. D. 1151), Decr. Pars. II., Caus. xxix;

q. 1. The consent of the parties makes the marriage. He who is in error does not consent. But not every sort of error voids a consent given. Errors are of four kinds, error concerning the person, the condition of the person, his fortune, his character. If there is an error of the person there is no consent; for if a man had made a contract to sell a field to Marcellus, and Paul should come pretending to be Marcellus, and buy the field, how could Paul pretend that he had bought the field for himself? If there is an error of condition, so that one shall believe the other party to be free when he is actually a slave, there is no consent; for if a man should contract to sell me gold, and should deceive me by bringing me brass, I could not be held to have bought the brass. But an error of fortune does not vitiate consent; for if a man should accept an ecclesiastical office, thinking it to be profitable, and should find it less rich than he expected, he would not be free to renounce it; and so a man who marries a poor woman, erroneously thinking her to be rich, cannot void the marriage because of that error. And an error concerning character does not vitiate consent; for if I should buy a field believing it to be exceedingly fertile, and should find it to be, in fact, sterile, the purchase would not be void; and so a man who should marry a woman, believing her to be a chaste virgin, when she is, in fact, a fallen woman, or even a prostitute, would not be at liberty to put her away and marry another.

359. *Decretals of Gregory IX.* (A. D. 1230), IV. 9; 2, 4. When a free man has married a slave woman, of whose condition he was ignorant, the marriage is voidable, unless the man has cohabited with the woman after he knew her to be a slave. [Alexander III., A. D. 1159–1181, and Urban III. A. D. 1185–1187.]

XVIII. CLANDESTINITY.

§ 1. Much of what might be said concerning the impediment of clandestinity has been said already in explanation of the nature and effect of contracts *de præsenti* under the head of *Precontract.*

§ 2. The consent of parents being indispensable to the validity of a Hebrew or Roman marriage, clandestine marriages were not generally possible. So late as the time of St. Basil (see 117, 118), they would have been considered as simple fornication, and a law of Theodosius the younger (A. D. 438), declared that the presence of friends as witnesses was one of the four things universally necessary to the validity of a marriage, the other three being the consent of the parties, their equality of condition (see *Condition*), and the absence of other legal impediments, such as consanguinity, etc.

§ 3. For the interest of the commonwealth, for the protection of minors, for the security of offspring, for the stability of marriage itself, and for the maintenance of morals, it is necessary that clandestine marriages should be discouraged alike by church and state, and though, as we have seen under *Precontract*, a vicious practice arose during the middle ages with an unquestionable allowance of the church, yet the allowance of the church was nothing more than recognition. It was not encouragement. On the contrary, all canons on the subject forbade clandestine marriages.

§ 4. And yet the impediment raised by the church was never understood to be more than prohibitive. A

marriage, actually contracted, though it were never consummated, or a mere verbal contract *de præsenti*, was held to be a true and valid marriage from which the parties could not escape, and at length the evils arising from such contracts became so great that the Council of Trent declared that they should thenceforward be invalid, thus making clandestinity a dirimant impediment in the Roman church.

The following canons, etc., require no further explanation or comment: —

D. Canons, Decrees, etc.

360. *Hormisdas, Papa*, (A. D. 514-523), Decr. Pars. II. Caus. xxx, q. 5, c. 2. No Christian of whatsoever condition he may be, shall marry secretly, but let him marry openly in the Lord, receiving the benediction of the priest.

361. *Conc. Forojul.* (A. D. 791), c. 8. No man shall contract a marriage secretly, violently, or clandestinely.

362. *Conc. Vern.* (A. D. 844), c. 15. All laymen, whether noble or not, shall celebrate their nuptials publicly.

363. *Conc. Londin.* (A. D. 1102), c. 22. A promise of marriage between a man and woman shall be void if it be given without witnesses and be afterwards denied by one of the parties.

364. *Conc. Lateran. IV.* (A. D. 1215), c. 51. Forasmuch as the prohibition of marriages in the last three degrees is removed, we will that it be strictly observed in the others. Therefore, following the steps of our predecessors, we do utterly prohibit clandestine marriages and we prohibit all priests from being present at such. Wherefore we extend the local customs of certain places and decree that when marriages are to be celebrated they shall be pub-

licly announced by the priests in their churches, and that a sufficient time shall be set within which any man who can and will may allege a lawful impediment, and that the priests themselves shall also investigate whether any impediment exist; and if any probable allegation appear against the proposed marriage, it shall be interdicted until by manifest evidence what ought to be done shall be made clear. But if any one shall presume to enter into any such clandestine and prohibited marriage, in any forbidden degree, although he do it ignorantly, yet shall the offspring of such a union be accounted illegitimate, and shall have no defence in the ignorance of the parents, who might have entered into their contract either in real or in affected ignorance. Likewise the offspring shall be accounted illegitimate if both parties knowing the existence of a lawful impediment have presumed to make their contract in the face of the church. And assuredly, if any priest, secular or regular, shall neglect to prohibit such clandestine marriages or to be present at them, he shall be suspended for three years, and severely punished as the nature of his offence requires. And furthermore, a fitting penance shall be laid upon those who engage in clandestine marriages even in a permitted degree; but if any one shall maliciously allege an impediment merely for the purpose of hindering a marriage, he shall not escape just punishment.

365. *Decretals of Greyory IX.* (A. D. 1230), IV. 3; 1. No marriage is presumed to have been clandestine, and the burden of proof rests upon the person who makes such an allegation. [Erroneously attributed to a Council of Arles.]

366. IV. 3; 2. If persons have engaged in a clandestine marriage, and either or both of the parties deny the marriage, and no lawful evidence of the fact can be given, the parties are not required by the church to live together; but if he parties to such a marriage afterwards publish it, they are to

be received and approved, as if it had been openly celebrated in the face of the church. [Alexander III., A. D. 1159–1181.]

867. IV. 4; 3. When a marriage is to be contracted, it ought to be publicly proclaimed by the priest in the church, and a time ought to be named within which any man may allege an impediment thereto, and if a probable conjecture of any impediment be alleged, the marriage must be postponed until the matter can be investigated. [Alexander III.]

368. *Constitutions of Walter, Abp. of Canterbury* (A. D. 1322). The priest shall often admonish the people that, if they wish to marry they must not otherwise contract marriage than in a well known place, and in the presence of many and well known persons assembled for that purpose. And before the marriage, on three several Sundays, or on three holy days, with an interval of some time between them, the priest shall make public inquiry of the people whether the bridegroom and the bride may lawfully be joined together. Marriage, like the other sacraments, is to be celebrated with honor and reverence, in the daytime, and openly before the church.

369. *Constitutions of Simon Mepham, Abp. of Canterbury.* (A. D. 1338). If any priest, secular or regular, shall solemnize, or be present at, a marriage elsewhere than in a parish church, without special license from the bishop, he shall be suspended from office for a year. The Decretal (IV. 4; 3) requiring the publication of banns is to be often explained to the people; and any priest who shall be present at a marriage without banns, shall be suspended for three years.

370. *Constitutions of John Stratford, Abp. of Canterbury* (A. D. 1342). Marriages may be celebrated in parish churches or in chapels having parochial rights, but priests

who marry any others than their own parishioners, and all persons concerned in clandestine or forced marriages, even in churches, chapels, or oratories, are to be excommunicated and otherwise punished as the law directs.

371. *Conc. Trid.* (A. D. 1563), Sess. xxiv, c. 21. Although it is not to be doubted that clandestine marriages, contracted with the free consent of the parties, are true and valid marriages so long as the church does not invalidate them; and although they are to be condemned, as the holy Synod does condemn them, who deny that such marriages are true and valid; and although they also are to be condemned who falsely affirm that marriages contracted by children without the consent of parents are invalid marriages which the parents can make either void or valid; nevertheless the holy church of God has always, for the best of reasons, abhorred and prohibited marriages of that kind. But when the holy Synod observes that those prohibitions, through the disobedience of men, are of no avail, and considers the heinous sins which have their origin in clandestine marriages, and especially the state of damnation in which men remain, who, having abandoned a wife secretly married, marry another wife publicly and live with her in perpetual adultery, against which evil the church, not judging things that are secret, can provide no remedy unless some more effectual means be found; therefore, following the steps of the holy Lateran council (*supra*, 351), held under Innocent III., it is decreed that, for the future, before a marriage is contracted, it shall be thrice publicly proclaimed at mass, on three successive festival days, by the parish priest of the contracting parties, after which proclamations, if no lawful impediment be alleged, the celebration of marriage in the face of the church may go on; and then the parish priest, after interrogating the man and the woman, and receiving their assent shall either say: I join you in marriage in the name

of the Father, and of the Son, and of the Holy Ghost, or else he may use other words according to the received rite of his particular province. And if at any time there be reasonable cause to fear that if so many proclamations be made, the marriage may be maliciously hindered, then let only one proclamation be made; or let the marriage be celebrated forthwith in the presence of the priest and two or three witnesses, and then, before the marriage is consummated, let the proclamation be made in church, so that, if there really are any just impediments, they may be the more easily discovered, unless the ordinary shall judge it expedient to remit the aforesaid proclamations, and this the holy Synod leaves to his prudence and judgment. But if any man shall attempt to contract a marriage otherwise than in the presence of the parish priest, or of another priest, acting by license of the parish priest or of the ordinary, or without two or three witnesses, the holy Synod declares him to be utterly incapable of contracting marriage in any such other way; and it declares such contracts to be null and void; and by this present decree it voids them and annuls them. Moreover, it requires that any priest, parochial or other, who shall take part in a contract of that kind with a smaller number of witnesses, and witnesses who shall take part in it without the presence of the parish priest or other priest (as above), and also the contracting parties themselves, shall be severely punished at the discretion of the ordinary.

E. Anglican Reformation.

§ 1. Rubric before the Office of Matrimony in the first Prayer Book of Edward VI. (A. D. 1548), and in the present English prayer book: —

First, the banns of all that are to be married together must be published in the church three several Sundays or

holy days, in the time of divine service, immediately before the sentences for the offertory; the curate saying after the accustomed manner.

And if the persons that are to be married dwell in divers parishes, the banns must be asked in both parishes; and the curate of the one parish shall not solemnize matrimony between them without a certificate of the banns being thrice asked from the curate of the other parish.

§ 2. *Canons of 1603.* Can. 62. Forbids any minister, upon pain of suspension from office for three years, to celebrate matrimony without publication of banns, unless he has a special faculty or license; nor at any time but between the hours of eight and twelve in the forenoon; nor in any private place, but in the church or chapel where one of the parties dwelleth; nor in any case without consent of parents or governors, if either of the parties is a minor.

§ 3. Can. 63. Ministers of exempt churches disobeying any part of Can. 62, are to be suspended by the Ordinary for three years.

§ 4. Can. 101. Provides that licenses to marry without banns shall be granted only by persons having episcopal authority, and to persons of good state and quality.

§ 5. Can. 102. In granting licences, security is to be taken (1) that there is no impediment to the marriage; (2) that there is no suit pending in any court touching any alleged contract of marriage of either of the parties; (3) that the consent of parents or guardians has been given; and (4) that the marriage shall be publicly celebrated in the parish church or

chapel where one of the parties lives, and not elsewhere.

§ 6. Can. 103. Before license is granted for marriage without banns, two witnesses must swear that the consent of parents or guardians has been obtained, and one of the parties must personally swear that he believes there is no just impediment of any kind.

§ 7. Can. 104. In the case of a widow, evidence of her parents is not required, but the dwelling place of the parties and the parish where the marriage is to be celebrated must always be mentioned. If a license is granted contrary to the canon it is void, and a marriage contracted under it is clandestine.

§ 8. 6, 7 William III., cap. 6 (A. D. 1694). No person shall be married at any place pretending to be exempt from the visitation of the bishop of the diocese, without license or banns, under pain of £100 forfeiture by the officiating minister; and for the second offence, suspension from office and benefice for three years.

§ 9. 7, 8 William III., cap. 35 (A. D. 1695). Declares the previous act to have been found insufficient, since it does not reach the substitutes of ministers having cure in exempt churches, nor ministers who have no cures or settled habitation, nor ministers in prison for debt. It is therefore enacted that any minister marrying without banns or license, shall, for every offence, forfeit £100, and the same for suffering a substitute to do it for him. Also, that every man, so married without banns or license, shall forfeit £10, and the sexton or parish clerk assisting, £5; and that

commissioners shall have power to oblige ministers to produce licenses and certificates of banns.

§ 10. X *Annæ*, cap. 19 (A. D. 1711). To prevent the inconveniences of clandestine marriages, enacts that every person in holy orders who shall solemnize marriage without banns or license shall forfeit £100; and, if he be a prisoner in any private jail, he shall be removed to the county jail and remain charged in execution with the said penalty; and, if any jailor permit or be privy to such a marriage, he shall forfeit £100.

IX. IMPEDIMENT OF PUBLIC DECENCY.

§ 1. The impediment of Public Decency, as it is understood by canonists, is nearly related to the impediment of affinity, and prohibits marriage between either of two persons who have been betrothed and the kindred of the other. This impediment, though it had no place in the Hebrew law, and did not absolutely prohibit or void marriage under the ancient law of Rome, was nevertheless so recognized by Roman public opinion as to require the recognition of the jurists. Thus Justinian: —

Justin. Inst. I. 10, 9. If your wife after divorce gives birth to a daughter by another man, the child is not your stepchild, yet Julian thinks that marriage with her ought not to be contracted; and, in like manner, though the betrothed wife of your son is not your daughter-in-law, and the betrothed wife of a father is not the stepmother of his son, yet they who avoid such marriages will do well.

§ 2. When the church afterwards recognized this im-

pediment as absolutely dirimant, the mischiefs which followed were as tyrannous as they were absurd. Any contract, whether open or secret, whether *de præsenti* or *de futuro* (see *Precontract*), and whether valid or invalid (see 382), raised at once the impediment either of affinity or of public decency; and the iniquitous system of betrothing children yet in their cradles, led to singular complications. For the law of the church was that if any man were betrothed to a child of over seven years of age, or if he were betrothed to her before that age, and the betrothal continued after it, the impediment of public decency ever afterward prohibited either the man or the child from marrying any near relation of the other. The cases which gave rise to the decrees of Pope Alexander III. on this subject furnish curious illustrations of the cruel entanglements occasioned by creating a dirimant impediment of marriage out of a mere public sentiment, however general or originally reasonable; and in this matter, as in so many others, the members of the Roman communion have reason to be thankful to the Council of Trent for abolishing by far the greater part of these absurdities. Perhaps it is not heresy to believe that the Fathers of Trent would have done still better if they had abolished the impediment *justitiæ publicæ honestatis* altogether.

Papal Decrees.

372. *Decretals of Gregory IX.* (A. D. 1230), IV; 1, 3. If a child of more than seven years is married to a girl of less than seven, and she has been taken to his home, such a contract raises the impediment of public decency; (so

that, as the case shows, the subsequent marriage of the boy with a cousin-german of the girl was void.) [Eugenius II., A. D. 824–827.]

373. IV. 1; 4. A betrothal between parties who cannot be married because of an impediment of consanguinity, raises the impediment of public decency; (so that an unlawful betrothal might hinder an otherwise lawful marriage of the parties.) [Alexander III., A. D. 1159–1181.]

374. IV. 1; 8. Betrothal, certainly (*maxime*), if the girl is nearly of a marriageable age, raises the prohibitive and dirimant impediment of public decency between the girl and the man's kindred. [Idem.]

375. IV. 2; 4. From betrothal with a girl of less than seven years the impediment of public decency does not arise; if she is over seven years of age it does. [Idem.]

376. IV. 2; 6. The impediment of public decency is raised by betrothal with a girl of over seven years. [Idem.]

377. *Conc. Trid.* (A. D. 1563), Sess. xxiv. c. 3, De Reform. Matr. The holy Synod utterly removes the impediment of public decency in all cases in which the betrothal itself is not valid (see 373). And when it is valid, the impediment shall not exist beyond the first degree.

Canons Concerning Second Marriages and Other Marriages Forbidden on the Ground of Propriety.

§ 1. It is not from any want of respect to the usual classification of canonists, that the canons, etc., relating to second marriages, and disreputable marriages of the clergy and the laity, are introduced under this head. Logically, it is to this head that they belong, since the objection to them had its origin in public opinion only;

and if it be objected, as it fairly may be, that the impediment to such marriages was merely prohibitive, it must not be forgotten that in some of them it seems to have been actually dirimant (392, 393, 396, 299). Perhaps, however, the best reason for classing them here is that the author finds it convenient.

§ 2. It is difficult to conceive the reason for the extravagant detestation of second marriages which prevailed among the early Christians, particularly in the East. In the Old Testament there is nothing to suggest the unlawfulness or even the impropriety of such marriages; and among the Romans, though the chaste widowhood of a woman to her life's end was highly honored, it was chiefly so, perhaps, because, except in the case of women who were left widows late in life, examples of such voluntary continence were extremely rare.

§ 3. In the New Testament we find that St. Paul, who was always disposed to discourage marriage in others, and who seems to have assumed the gift of continence to be so universal in unmarried women that they might properly be restrained from marriage by their parents, nevertheless urged peremptorily that the younger widows should marry, and declared his belief that they cannot generally be expected to do otherwise, even after a promise of continence.

1 Tim. v: 11, 12, 14, 15. The younger widows refuse, for when they have begun to wax wanton against Christ they desire to marry, having condemnation because they have rejected their first faith. I will, therefore, that the younger widows marry, bear children, rule the household, give none

occasion to the adversary for reviling; for already some are turned aside after Satan.

§ 4. Notwithstanding these explicit instructions of the apostles, second marriages by persons of either sex were strongly disapproved by public opinion among the Christians from very early times.

§ 5. In the Apostolic Constitutions we find them permitted, as a defence against fornication; third marriages are said to indicate incontinence, and beyond the third they are manifest uncleanness. In the fourth century we find second marriages almost universally subjecting the parties to penance; and we find the large and influential sect of the Cathari withdrawn from the Catholic Church partly because digamists were not excommunicated; so that the difference between the Catholics and the Cathari was simply this, that the former considered a first marriage to be a prohibitive impediment, while the latter held it to be a dirimant impediment to a second marriage.

§ 6. Centuries later, when public opinion against second marriages of the widows of laymen had died out in the west, it continued unabated against the marriage of widows of clergymen, who were restrained from marriage in some instances by very cruel penalties.

§ 7. When public opinion was so strongly set against second marriages in general, it was inevitable that they should be severely prohibited among the clergy; and the apostolic rule which originally required the superior clergy to be husbands of one wife (see *Order*), was very early understood to mean that they must either be

such, or else must be unmarried men. In short, it may be assumed that the rule prohibiting digamists from holy orders was always and everywhere absolute and universal. The marriage itself was not void, but after the aversion to second marriages of the laity had died away, digamy continued according to the apostolic precept, to be an impediment to the holding of any ecclesiastical office, order or function; and, though often disregarded, it has never been explicitly repealed even by the Anglican Church.

§ 8. The ecclesiastical law which forbade the marriage of clergymen with a widow, a harlot, a slave, or an actress, was doubtless inspired, in part, by the aversion to second marriages; but it was also a close following of the Levitical law of the marriage of priests.

Lev. xxi: 11, 13, 15. Speak unto the priests, the sons of Aaron and say unto them: * * * Ye shall take a wife in her virginity. A widow, or a divorced woman, or a harlot, these shall he not take; but he shall take a virgin of his own people to wife. Neither shall he profane his seed among his people, for I, the Lord, do sanctify him.

§ 9. Marriage with a slave was necessarily forbidden. The marriage of a free man with a slave was not a legal marriage under the Roman law (see *Condition*) but a disgraceful and disreputable *contubernium* which must debar a man from any sacred function; and if the disrepute of such a connection could have been disregarded, still the wife being subject in all things to the will of her master, it would have been impossible for her husband to "rule his own house," as the apostolic law (1 Tim. iii: 5) required.

§ 10. Marriage with an actress could not be permitted because the actress was either a slave or of the lowest class of *libertinæ*; her profession was infamous; she was commonly a harlot; and she was, of necessity, a heathen. The prohibition of marriage between any Christian woman and an actor, tragic or comic, (see 381) might have been placed under the head of *Religion*, since the occupation of an actor required him to be constantly engaged in what had from time immemorial been considered to be heathen celebrations.

Canons, Decrees, Etc.

378. *Ap. Can.* 17. He who, after baptism has been twice married, or has had a concubine, cannot be a bishop, presbyter, or deacon, or be on the sacerdotal list at all (*i.e.*, he cannot be one of the minor clergy).

379. c. 18. He who has married a widow, or a divorced woman, or a harlot, or a slave, or an actress, cannot be a bishop, presbyter, or deacon, or be on the sacredotal list at all.

380. *Apost. Const.* III. 2. You ought to know this, that to marry once according to the law is righteous, because it is according to the will of God; but second marriages after a promise of widowhood are wicked, not on account of the marriage itself, but because of the breach of promise. Third marriages indicate incontinence, and marriages beyond the third are manifest uncleanness; for in the creation God gave one woman to one man. To the younger women let a second marriage be allowed after the death of the first husband lest they fall into condemnation of the devil.

381. *Conc. Eliber.* (A. D. 305), c. 67. It is forbidden that any Christian woman intermarry with a comic or tragic actor. Penalty: suspension.

382. *Conc. Neo-Cæsar.* (A. D. 314–323), c. 3. Concerning those who fall into many marriages, the appointed time of penance is well known, but their good behavior and faith shorten the time.

383. c. 7. A presbyter shall not be a guest at the nuptials of a person contracting a second marriage; for, if the digamist shall ask for penance, what shall the priest be who, on account of the feast, sanctions the marriage.

384. *Conc. Nicæn.* (A. D. 325), c. 8. The Cathari, when reconciled to the Catholic church, are required to promise "in particular, that they will communicate with persons who have been twice married."

385. *Conc. Laod.* (A. D. 343–381), c. 1. We declare it to be right, according to the ecclesiastical canon, that the Holy Communion should be given by indulgence to persons who have freely and openly joined in second marriages, but who have not made a clandestine marriage; a short space having elapsed which is to be spent in prayer and fasting.

386. *S. Basil.* (A. D. 370), c. 4. Declares the early rule to have been that persons who married a second time should be under penance for a year or two, and those who married a third time for three or four years; but in his own day he says that the custom was to subject the latter to a penance of five years.

387. *Conc. Tolet. I.* (A. D. 400), c. 3. A reader who has married a widow shall not be promoted, but shall remain a reader, or at most a subdeacon.

388. c. 4. Provides that a subdeacon who marries a second time shall become reader or a door-keeper.

389. c. 18. If the widow of a bishop, presbyter, or deacon shall marry again, she shall not be admitted to the sacrament until she shall be dying.

390. *Innocentius I., Papa* (A. D. 401–417), Epist. ad

Felicem. c. 2. A person who has been twice married must not be a clergyman, since only "the husband of one wife" can be admitted to the priesthood. Moreover his wife, when he married her, must have been a virgin, not a widow or a harlot. In cap. 6, Gregory insists that a marriage before baptism is to be reckoned in this connection as well as a marriage after baptism, since baptism, though it remits sins, does not diminish the number of a man's wives!

391. *S. Hieron.* (circ. A. D. 400), Ep. ad Timoth. A bishop ought to be the husband of one wife, that is of one wife married after baptism; but if he has married one before, and another after baptism, he is not to be considered a digamist; for by his baptism he is made a new man; all old things are remitted, and neither fornication, nor anything else that he has done, is counted against him.

392. *Conc. Agath.* (A. D. 506), c. 62. Marriage with the widow of a presbyter or deacon is forbidden.

393. *Conc. Aurelian. I.* (A. D. 511), c. 13. The same under penalty of excommunication unless the parties consent to separate.

394. *Conc. Epaon.* (A. D. 517), c. 32. Prohibits the same.

395. *Conc. Antisiod.* (A. D. 578), c. 22. The same.

396. *Conc. Matiscon. II.* (A. D. 585), c. 16. The widow of a subdeacon, exorcist or acolyte is forbidden to marry. If she does, she is to be imprisoned for life in a convent.

397. *Conc. Hispal. II.* (A. D. 619), c. 4. Certain persons who had married widows, having been promoted to the diaconate, their promotion is to be void, and for the future no such person is to be made a deacon.

398. *Conc. Tolet. IV.* (A. D. 633), c. 4ϱ. Clergymen who have married a widow, a divorced woman, or a harlot without the permission of the bishop are to be separated.

399. *Conc. Vermer.* (A. D. 753), c. 3. If a presbyter have married his niece, he shall put her away and forfeit his rank. If another man have married her after she is put away, let him also dismiss her; and, if he cannot contain, let him marry another; for it is blameworthy if the divorced wife of a priest be married to another man.

400. *Decretals of Gregory IX.* (A. D. 1230), I. 21, 1. Digamists, persons under penance, and men who have married divorced women, shall not proceed to the priesthood. [Conc. Aurel. IV.]

401. I. 21, 2. There can be no dispensation allowing the ordination of a digamist to holy orders (which is contrary to the precept of the apostle). If such an ordination takes place the ordained is to be deprived, and his ordainer is to lose the power of ordination, but he may be restored. [Lucius III., A. D. 1181–1185.]

402. I. 21, 3. A digamist cannot be ordained whether his wife be alive or dead. [Celestine III., A. D. 1191–1198.]

403. I. 21, 6. A man who has had several concubines is not a digamist. [Innocent III., A. D. 1198–1216.]

404. I. 21, 7. A subdeacon who contracts with a widow, and has carnal knowledge of her is a digamist. [Idem.]

Scholium.

From the preceding canons etc., we observe: —

a. That in very early times, while second marriages were tolerated and even recommended to widows, third and fourth marriages were regarded with disgust; 380.

b. That digamy was at an early time regarded as just cause for penance; 382, 383, 385, 386.

c. That in the reconciliation of the Cathari the Council of Nicæa found it necessary to stipulate that the Cathari would communicate with digamists; 384.

d. That the regulations against digamous clergy were exceedingly stringent, and not less so against clergymen who married digamous or disreputable women. See *Order*, D. Scholium.

e. That the widow of a bishop, priest, or deacon was forbidden to marry, 392, 394, 395;

f. Under penalty of excommunication, unless she separated from the man, 393;

g. That by one canon a woman so offending was to be excommunicated until death, 389;

h. And that by another she was to be imprisoned for life, though her husband had been in minor orders only; 396.

i. That the divorced wife of a presbyter might never marry again, though the former marriage had been unlawful; 399.

k. That no Christian woman might marry an actor; 381.

l. The curious difference of opinion between Innocent I. and St. Jerome, as to the rule for counting the wives of a digamist is perhaps worth noticing; 390, 391.

m. The Decretals are too brief to be further summarized, except to note that by 404 a man who marries a digamist is himself a digamist.

XX. OF INDULGENCES, DISPENSATIONS, ETC.

In any attempt to arrive at the real practice of the church in all ages and provinces, it is not enough to examine the documents of canon law; since the granting of indulgences to penitents has very often practically operated as a virtual abolition of the law which declared the offenders to be liable to discipline; and in the Latin provinces the granting of venal dispensations to transgress the law has made the law itself a mere impost of taxation.

It is matter of regret that we have no satisfactory means of ascertaining the actual rules of the Orthodox (Greek and Russian) Church, and of the other oriental communions concerning marriages prohibited by their own canons, or concerning divorce (and marriage after divorce), for other causes than that of fornication. From the limited and insufficient information given in popular works, one would infer that the prohibited degrees acknowledged by the primitive canons are rarely set aside, though there is reason to think that they are sometimes disregarded; but, as to divorce, unless the orientals are grossly belied, their practice, (I am using *very* moderate language), is as lax as licentiousness itself could desire it to be. On this subject, however, I speak with very great reserve, having no better authority than the reports of popular writers, who may possibly be misinformed, and who are probably, on this subject, unintelligent.

As to the Latin churches there is no need nor any possibility of doubt. The whole system is an abominable fraud. The Church of Rome, and the churches in communion with it, profess to have the purest and most perfect law of marriage that the world has ever known. In fact, their law is a stupendous system of fraudulent extortion. With impediments of consanguinity and affinity which extend to the fourth degree, that is to say, which declare the marriage of a man with his third cousin or with a third cousin's widow to be sheer fornification; with the artificial impediment of spiritual affinity; and with all the sophistical applications of *thirteen other dirimant impediments;* the fact

is that in the actual practice of the Church of Rome, there is not one of them which may not, and few of them which are not, daily set aside by the operation of purchased dispensations. If Cardinal Manning publishes to the English people his earnest hope that marriage with a deceased wife's sister may not be made legal, it is possibly because the English Cardinal has the best reason to know that, without the restraint of English law, incest much more flagrant would soon become common among English Romanists. The court of Rome, for a sufficient fee, not only allows marriage with a deceased wife's sister, but while it professes to prohibit marriage with a *third cousin's widow*, as we say, it readily permits any man who can afford the stipulated fee to marry his niece or even his aunt.[1]

[1] The following paragraph from Smith's Dictionary of Christian Antiquities (foot-note, p. 1729, *Am. Ed.*), would almost be sufficient to justify what is said above: —

"Under the shadow of the system of dispensations, the practice of marriage with nieces and sisters-in-law has become once more not unfrequent. Cardinal Guibert, archbishop of Paris, in an address to his diocese made at the beginning of Lent, 1877, which is devoted to the question of marriage, complained that the infractions of the rules as to intermarrying within the prohibited degrees had become alarming in their number. 'Marriages between uncles and nieces, and between brothers-in-law and sisters-in-law, which used to be unknown, or almost unknown, have multiplied in these latter times to a degree which saddens us, inasmuch as it is a grievous weakening of the principles of the Christian faith.' The archbishop can complain of the evil, but he cannot forbid it, and he acknowledges that the state of things is worse in the rest of France than in Paris. (Mandement de S. Em. le Cardinal Archevêque de Paris, pour le Carême de 1877.)"

Of the fact that such dispensations are granted in a multitude of cases there is no denial; of the right to grant them there is no question in the church of Rome, but of the extent to which they may be lawfully allowed, there is difference of opinion, one school of canonists and theologians maintaining that the Pope, as Vicar of Jesus Christ, has power to dispense with any impediment whatsoever, while others hold that the power of dispensation extends only to impediments of ecclesiastical creation, and not to any impediment sanctioned by the letter of Holy Scripture. Professedly, at least, the court of Rome acts upon the latter principle; so that, as a matter of fact, the church of Rome has no impediment of consanguinity, or of affinity, or of anything else, which money or influence does not avail to set aside, except only the degrees of kindred within which marriage was prohibited by the law of Moses, and, indeed, even the law of Moses is set aside by papal authority.

The writer of these pages is not afflicted with the ecclesiastical disease which might be called Romanophobia. He does not possess the supernatural vision which detects Romanism under every chasuble, nor does he condemn everything as necessarily evil for the mere reason that it chances to be Roman; but so utterly does he detest and abominate the practical system of papal dispensations in the Roman Church, that he cannot trust himself to write of it, lest he should seem to be making an argument when he is only making a statement of well known facts. He has, therefore, thought it wise to translate an account of the system

from the learned and very moderate Abbé André, author of the *Cours de Droit Canon*, published, with the approbation of the Archbishop of Sens, in the Abbe Migne's *Encyclopœdie Théologique*, under the heading *Empêchements de Mariage*, § 5, col. 1149–1156, which is translated as nearly as possible, *ad verbum*. It is easy to see that the writer is very much ashamed of his subject.

§ 5 IMPEDIMENT, *dispensations*.

There has always been great reserve in the church in granting dispensations of marriage. In the first centuries they were not known at all. At least they were never granted, and they never will be granted in the case of dirimant impediments which are created either by the law of nature or by the law of God.[1] The church can dispense with no impediments, except such as are created merely (*purement*) by ecclesiastical law, *by human law*, says St. Thomas; and the council of Trent decrees that if the marriages have not been (actually) contracted, the dispensation ought either to be refused, or else granted rarely, for just cause only, and without money consideration (*gratuitement*). (Sess. xxiv. c. 5, de Reform.)

The same council in the same place is more indulgent to marriages already contracted in good faith. It must be confessed that in the first centuries, dispensations of marriage were so rare, even in the case of sovereign princes, that none were ever given at all, except, perhaps, when a marriage had been contracted notwithstanding some impediment which was unknown to the parties, and when they could not be separated without causing a great scandal. History,

[1] One might ask how marriage with an *aunt* is to be brought under this unguarded statement.

and particularly the history of France, informs us of the difficulties which were always encountered even by princes, when they demanded dispensations in the case of certain degrees of kindred. In a council held at Rome, Gregory VI. absolutely refused to consent to the marriage of Robert and Bertha, who had been his godmother, or, as some say, his *commater*. In the same way Gregory VIII. refused to grant a dispensation to Alphonso, King of Castille, who had married a kinswoman, and required him to separate from her. Pascal II. was equally firm, and in like manner refused a dispensation to Uraca, daughter of the king of Castille, who had married Alphonso, King of Arragon, her kinsman in the third degree (*i. e. second cousin*).

§ 6. *To whom the right of granting dispensations belongs.*

It is chiefly in a general council that the church has the right to establish dirimant impediments, to grant dispensations from them, and to declare when and how they may be dispensed with. But as it rarely happens that the church is assembled in a general council, and as there are pressing necessities which sometimes demand that the rigor of canons should be relaxed, it is incontestably to the pope, as head of the church, that the right of granting dispensations belongs on such occasions, and of seeing that they are observed. Such is the doctrine of St. Thomas, which he expresses in these terms: *Those things which the Fathers declared to belong to political law* (esse de jure politico) *were left to the discretion of the pope, so that he might change or dispense with them according to the necessities of times and occasions; and when the pope does otherwise than as the Fathers have ordained he does not transgress their ordinances, because the intention of the ordainers is observed although the letter of their ordinances is not observed; for the letter cannot be*

observed in every case and at all times, if the intention, which is the advantage (utilitas) *of the church, is to be carried out.*

§ 7. *Causes of dispensations of marriage.*

We have already more than once remarked that according to the spirit both of the ancient and of the modern discipline, dispensations are legitimate only so far as they are granted for sufficient reasons; and the reasons must relate to each particular impediment. It is impossible in this place to detail all of them, but they may readily be understood from the principles which are peculiar to the several impediments. We confine ourselves to those which relate to the impediment of consanguinity because it is brought up every day (*parce que l'usage en est journalier*). Corradus lays down twenty-six causes which are held at Rome to be sufficient for such dispensations. Twenty-one of them refer to cases in which the parties have not had carnal knowledge of each other; five refer to cases in which there has been carnal knowledge. The latter are the last five in the following list:

1. The first cause is the smallness of the place (*propter angustiam loci*). When a girl is born and reared in a place so confined (*resserré*) that, on account of the extent of her family, her property, her rank, or the customs of the age in which she lives, she can find none but a kinsman who is suitable to her and with whom she may hope for the peace which makes the blessedness of marriage, the pope permits her to marry him. Collet, in his treatise of dispensations, maintains that this reason cannot be applied either to a man or to a woman of the dregs of the people, nor to a person who lives in a place where there are more than three hundred households (*foyers*), nor to a woman whose kinsman is in a closer degree of consanguinity than the third. This is the doctrine of Corradus who says (vii: 5, 44): *The quality of the persons*

being invariably added, namely that they are at least persons of honorable family, which must always be verified. It is easy to see why a girl of low birth is treated less favorably than another, for she is commonly [1] better off elsewhere than in her father's house.

2. The second cause is the smallness of places (*angustia locorum*). The difference between this cause and the preceding is this, that the girl may have been born in one place and live in another. This cause is understood to apply to both places, and presents the same reason for dispensation, namely, not to constrain a girl or a widow to continence by obliging her to leave the circle of her family to which she may be more closely attached than to marriage.

In order to establish that a girl has not been able to find a husband, it is sufficient that no one has sought her. As St. Ambrose says, it is neither usual nor becoming for a girl to make advances, whence the canon (can. 13, caus. 32, quaest. 2): It is not according to maiden modesty to select, and certainly not to search industriously (*quæritare*), for a husband.

3. When a girl does not find a suitable match in her own neighborhood, and is not rich enough to find one elsewhere. This cause may be alleged when they are no other family reasons (for the proposed marriage). Corradus calls it *causa propter angustiam cum clausula.*

4. *Propter incompetentiam dotis oratricis.* When a girl on account of the modesty of her dowry, can find no one but a kinsman to marry her. Collet is right in maintaining against several authors that a girl's dowry is not *incompetent* if it is sufficient to enable her to marry a man of her own rank, though it may not be sufficient for her marriage with a

[1] *Ordinairement*, but surely this must be a misprint for *rarement*, which means precisely the contrary.

kinsman who is richer or more powerful than herself. Neither is it incompetent when a girl who has nothing, or nothing at the time, will be rich after the death of the parents; but it is incompetent when it is from a stranger or any other relative than her parents that a dowry is to come. At Rome a dowry is held to be incompetent if it is not sufficient to marry the girl to a man of her own rank in the place of her own domicile, though it might be sufficient in neighboring places.

5. *Propter dotem cum augumento.* When a girl's dowry is not sufficient to marry her to a man of her own rank, and a kinsman offers to marry her and make such addition to her dowry as her rank requires. This cause is implicitly contained in the next preceding, but it serves particularly in near degrees of consanguinity. *Here you are to understand,* says Corradus, *that an increase of dowry is not required in every degree when a dispensation is asked on the ground of incompetent dowry, but only in certain of the nearer degrees, I think in the second and third, or in the third only, whether of consanguinity or affinity, even if degrees of this kind are doubled* (*duplicentur*).

6. *Pro indotata.* When a kinsman offers to marry a kinswoman without dowry, and even to settle a dowry upon her, in order to be accepted. This cause does not greatly differ from the foregoing.

7. *Quando alies auget dotem.* When a kinsman offers to increase a girl's dowry, or to give her one in order that she may marry only a particular person, who, on his part, consents to the marriage only on condition of such increase of dowry. On this we will remark that if a man declares that *he* will give a dowry to his kinswoman if the pope grants him a dispensation to marry her, though it may not, in fact, be himself but another person who endows her in his favor,

the dispensation is good; his falsehood does not touch the ground of the affair.

8. *Propter lites super successione bonorum.* When a girl or a widow has important law-suits to carry on concerning a (disputed) inheritance, and she is in danger of losing them for the want of a husband to defend her. It is indispensable that the property involved should be considerable. *On no other condition*, says Corradus, *will this cause of dispensation be admitted by the pope in any degree, however remote.*

9. *Propter dotem in litibus involutam.* This cause differs from the foregoing only in the subject of litigation. In the former it is an inheritance; here it is the dowry. The reason for a dispensation is the same in both. Corradus says that these two causes serve only in the more remote degrees: *These two causes are not admitted indiscriminately in all degrees, but only in the more remote, say in the third, or in the third and fourth, whether they are descended from one or more common ancestors.*

10. *Propter lites magni momenti.* When by means of the (proposed) marriage great or important law-suits between the parties may be brought to an end, *i.e.*, when the parties, as Corradus says, *desire* (the dispensation) *in order to settle them and for the sake of peace.* Peace, then, is the object of this dispensation, and in dispensations of this kind the following clause is never omitted: *And the aforesaid litigations are first to be either withdrawn or settled;* a condition which the executor must take care is fulfilled before he delivers the dispensation.

11. *Propter inimicitias.* In order to put an end to great enmities between the parties. Here, again, peace is the cause of the dispensation. Corradus says that such enmities ought to be violent: *No one is presumed to injure another on account of a trivial hatred.* The executors of the

dispensation are expected to look to this, and to verify it by witnesses: *What hatreds of this kind are to be regarded as violent is left to the decision of the judge.*

12. *Pro confirmatione pacis.* Again the peace of families; when, after a recent reconciliation, it is desired to cement the union and peace of the parties and their kindred by a marriage: *Many things are granted for the sake of peace and concord which otherwise cannot be done.*

13. *Pro oratrice filiis gravata.* When a widow burdened with children of her first marriage finds a kinsman who offers to marry her and take care of her family. Corradus says there should be five children. If there were only four, it is probable that the dispensation would not be refused.

14. *Pro oratrice excedente viginti quatuor annos.* When a girl has reached the age of four and twenty years complete without being sought in marriage by a stranger, it is a legitimate cause of dispensation; though Corradus says that it is not sufficient of itself in the nearer degrees. The motive of the dispensation is the same for which the civil laws favor the marriage of girls advanced in age, namely, to avoid the disorders to which they are exposed by waiting too long. It is necessary, however, that the twenty-four years should have been completed, but it is not necessary (in the petition) to tell how much older she may be. Moreover, it is sufficient for her to say that up to that age she has found no husband; and it will be understood that she, or her parents in her behalf, have used such diligence as propriety permits. The cause of age, however, cannot be alleged in behalf of widows.

15. *Quando est locus ad littus maris.* When a girl's property is on the sea coast, in a place exposed to the incursions of pirates or infidels, she is permitted to marry a kinsman, if she does not find a stranger who is willing to share with her the danger of her home.

16. *Pro Belgis.* When there are so many heretics in a city that a girl must either marry one of them or not marry at all, or if she must either marry one of them or marry a kinsman, a dispensation is granted; and, as Collet says, it could not be refused without wounding religion.

17. *Pro Germania.* This cause is the same as the other; at Rome they put Belgium and Germany in the titles of these two causes, because these are the countries which most frequently furnish occasion for dispensations of this sort. Corradus says: *This cause has the same purpose as the foregoing; for the pope is petitioned to grant a dispensation in order that marriage may be contracted between persons of the same religion.*

18. *Ut bona conserventur in familia* (for the sake of keeping property in a family). Dispensations are granted at Rome for this cause, for political and family reasons; but chiefly because great properties cannot pass from one family to another without giving rise to jealousies, hatreds and litigations which never end. Corradus says, however, that this cause does not avail without great difficulty in the closer degrees.

19. *Pro illustris familiæ conservatione* (for the preservation of an illustrious family). The reason, says Corradus, which led to the admission of this cause, is that the preservation of illustrious families is a matter of concern both to the State and to religion, in order that their virtues may become hereditary.

20. *Ob excellentiam meritorum.* This cause is the service which a house has rendered, or may hereafter render to the church. It is noted in the canon *Tali*, 1 q. 7. The petitioner is required to prove the service, and Corradus tells us that these clauses are invariably inserted: *To your discretion in which we have a sure confidence in the*

Lord, etc.; and then: *if you shall find that the petition is based upon truth, concerning which we charge your conscience.*

21. *Ex certis rationalibus causis* (for certain reasonable causes). Corradus says, that according to the phraseology of the court of Rome, dispensations of this sort are called dispensations without cause. Since they cost more money *(comme elles sont plus chères)* than the others, he continues, it is important clearly to express the quality of the parties: *as for example whether they are of gentle blood, or born immediately of a noble race, whether they are illustrious or princely persons, or distinguished citizens.* These dispensations are granted only to persons of honorable family. The same author informs us that the executor to whom dispensation is directed is required not to verify the causes: *Neither ought the judge to make any inquiries concerning the aforesaid causes, which are general words, inserted not for the purpose of verification, but rather to introduce the favor as a sort of token of honor.* If, then, in the dispensation, the pope introduces the phrase "*for certain reasonable causes moving him thereunto,*" it is sufficient to make it the duty of the executor, out of respect for his holiness, not to make any inquiry into the nature of those causes.

22. *De causis dispensationum cum copula scienter de contrahendo.* When a girl and a young man who are related have had carnal knowledge of each other and apply for a dispensation of consanguinity in order to marry, it is readily granted, particularly if a refusal would be followed by bad results: *If the woman is under evil report and does not marry.* But the parties must not have had illicit intercourse for the purpose of facilitating the dispensation; or, if it were so, they must state the fact (in their petition), though it makes the granting of a dispensation more difficult; but if

they were to conceal the fact, the dispensation would be absolutely void.

23. *De scienter contracto.* When two persons have made a clandestine marriage by a contract *de præsenti*, and have consummated it by the crime of intercourse, a dispensation is granted if a refusal would result in scandal, as in the foregoing cases; and the clause is inserted, *provided that the parties have not committed the crime for the purpose of facilitating the dispensation.*

24. *De ignoranter contracto.* When parties discover, after their marriage, that there is an impediment between them, and thereupon cease to use the rights of marriage, and send to Rome for a dispensation, the pope grants it, if the dissolution of the marriage would cause scandal.

25. *De ignoranter contracto, quando oratores, detecto impedimento, pereverarunt in copula.* This cause is the same as the foregoing, except that the parties, after discovering the impediment, have continued to use the rights of marriage; a circumstance which must be expressed in the petition.

26. *Propter infamiam sine copula.* When the parties, without actual knowledge of each other, have been living in a familiarity which is dishonorable to them and which has occasioned evil surmises, so that if they do not marry, the girl will not be able to find a suitable match, and will consequently remain in a very dangerous situation. Collet, in his treatise of dispensations, explains the commentary of Fagnan on the chapter *Quia circa, de Consang*, where it is said that celebrated canonists disapprove of dispensations for infamous causes. He concludes, with reason, independently of the practice of the *daterie*, that such dispensations ought to be given, and that the custom of the court of Rome is either not to grant them, or to grant them with great

difficulty, when the parties have availed themselves of the cause for the purpose of obtaining a dispensation. For which case, see the Council of Trent, Sess. xxiv. c. 5, de Reform. which says: "*Let him be without hope of dispensation.*"

The learned author, writing in 1844, adds (Col. 1156).

We believe we ought to say here that for the last century, and more particularly for the last forty years, the court of Rome has been more ready (*facile*) than before to grant dispensations from certain impediments. The cause may be that corruption of morals has become greater, or, at least, more general, and that prudence and Christian charity suggest that there should be less opposition to marriages which are desired by particular persons.

We will also here add that although the council of Trent, as we have seen, forbids dispensations to the second degree of consanguinity, unless in the case of great princes and for public interest, yet by the recognition of the 21st cause of dispensation above given, and others which might be mentioned, dispensations are granted in the second degree, that is, to cousins-german; also, though more rarely, to persons of the first and second degree (*i.e.*, from the common ancestor), as to an uncle and niece; and also, though still more rarely, to an aunt and nephew; because in this last case the nephew becomes by marriage the head of the woman who is his superior by the law of nature. For this reason it is necessary to tell (in the petition) which of the two parties is in the nearest degree (to the common ancestor).

PART III.

OF THE DISSOLUTION OF THE MARRIAGE BOND.

[It was many days after the foregoing pages were out of hand before the writer could summon courage to give form to the materials contained in this part of his work. In what has gone before there have been abundant evidences of that saddest of all follies, the folly of the wise; but there have also been signs, no less abundant, of that noblest of all aspirations — noble, even in failure, and venerable, notwithstanding every fault — the aspiration after an ideal righteousness. In this part also there is folly to observe, but it is folly seeking to cure sin; the blindly wise leading the spiritually maimed. There is something touching as well as instructive in the mournful confession of that great and learned doctor of the church, St. Augustine, that the clear logic and masterly argumentation of his treatise concerning adulterous marriages did not, in his later years, command his own entire assent (Retract. ii: 57). One thing is very certain: if we glance back at the divine law of marriage which declares it to be a state of free equality and sacred chastity, maintained in an ideal unity which is indissoluble and exclusive; and if we then reflect that in a Christian church we are compelled to study whether the ideal unity is rent in twain and the indissoluble

bond dissolved by the unchastity of either party, so that the love which shuts out all comparison with other loves shall be dismissed with loathing, and the place which was exclusively given up to one sole occupant may be surrendered to another; the very fact that such questions can and must be studied, shows how far gone man is from his pristine righteousness. Perhaps the writer may be pardoned these few words expressive of his personal feeling, were it but because they serve to show how much of solemn thought and fruitful meditation "dry and thorny" studies such as these suggest, if one will think of what he reads and writes.]

A. The Hebrew Law.

§ 1. The sending away of Hagar by the patriarch Abraham (Gen. xxi: 14) cannot properly be considered as an instance of divorce, since Hagar was not a wife, but a slave, "under the hand" of her mistress, by whom and for a special purpose, she had been given to Abraham as a concubine (see *Condition*).

§ 2. Of the divorce of a wife the records of the patriarchal age furnish no instance; but that the right of a husband to put away his wife existed among the Hebrews before the giving of the law, appears from the fact that Moses did not institute the law of divorce, but merely recognized and regulated the practice.

§ 3. We may even assume that divorce was not unusual among the Hebrews in Egypt, since Moses in three several cases made laws relating to divorced women in precisely the same terms as were used with

reference to widows. (See below Lev. xxi:1; xxii: 12; Numb. xxx: 9.)

§ 4. The Mosaic law of divorce was as follows:[1] —

(1.) Deut. xxiv:1, 2. When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness (Marg. *matter of nakedness*) in her; then let him write her a bill of divorcement (Marg. *cutting off*) and give it in her hand, and send her out of his house; and when she is departed out of his house, she may go * and be another man's wife.

(2.) 3, 4. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die which took her to be his wife; her former husband which sent her away may not take her again to be his wife, after that she is defiled; for that is an abomination before the Lord; and thou shalt not cause the land to sin which the Lord thy God giveth thee for an inheritance.

§ 5. The right of divorce was forfeited, however, when a man was required to marry a girl whom he had seduced.

(3.) Deut. xxii: 28, 29. If a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all the days of his life.

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[1] For convenience of reference the passages of Scripture in this section are numbered, the figures being bracketted.

* Heb. *And she go*, etc. The continuous hypothesis of the Hebrew original supposes, of course, that all which is done is *lawfully* done.

§ 6. The right of divorce was also forfeited when a man falsely accused his wife of ante-nuptial unchastity. The accusation being proved to be a slander (Deut. xxii: 13, 17), the law was this: —

(4.) Deut. xxii: 18, 19. The elders of the city shall take that man and chastise him; and they shall amerce him in a hundred shekels of silver, and give unto the father of the damsel, because he hath brought an evil name upon a virgin of Israel; and she shall be his wife; he may not put her away all his days.

§ 7. The following passages may be considered in the same connection: —

(5.) Lev. xxi: 7, 14. They (the sons of Aaron), shall not take a wife that is * * * profane; neither shall they take a woman put away from her husband, for he is holy unto his God. * * * A widow or a divorced woman, or profane, or a harlot, these shall he (the high priest) not take, but he shall take a virgin of his own people to wife.

(6.) Lev. xxii: 12. If the priests's daughter be a widow, or divorced, and have no child, and is returned unto her father's house, as in her youth, she shall eat of her father's meat (*i.e.*, of the meat of the sacrifices), but there shall no stranger eat thereof.

(7.) Numb. xxx: 9. Every vow of a widow, and of her that is divorced, wherewith they have bound their souls, shall stand against her.

(8.) Isa. 1: 1. Thus saith the Lord, Where is the bill of your mother's divorcement, whom I have put away? Or which of my creditors is it to whom I have sold you? Behold, for your iniquities have ye sold yourselves, and for your transgressions is your mother put away.

(9.) Jer. iii: 1. They say, If a man put away his wife, and she go from him and become another man's, shall he return unto her again? shall not that land be greatly polluted? but thou hast been polluted with many lovers, yet return again to me saith the Lord.

(10.) Verse 8. And I saw, when for all the causes whereby backsliding Israel committed adultery I had put her away and given her a bill of divorce; yet her treacherous sister, Judah, feared not, but went and played the harlot also.

(11.) Mal. ii: 14–16. The Lord hath been witness between thee and the wife of thy youth against whom thou hast dealt treacherously; yet is she thy companion and the wife of thy covenant. And did he not make one? Yet had he the residue (Marg. *excellency*) of the spirit. And wherefore one? That he might seek a godly seed. Therefore take heed to your spirit, and let none deal treacherously (Marg. *unfaithfully*) against the wife of his youth. For the Lord, the God of Israel, saith that he hateth putting away (Marg. *if he hate* her, *put* her *away*), for one covereth violence with his garment, saith the Lord of hosts; therefore take heed to your spirit, that ye deal not treacherously.

Scholium.

A careful examination of these passages will discover the following particulars of the Hebrew law of divorce.

a. The right to divorce belonged to the husband only, and not to the wife. [The first recorded instance of a wife divorcing her husband is that of Salome, sister of Herod the Great, who divorced her husband, Costobarus, to please her brother. Of this case Josephus says (Ant. xv: 7, 10): "This was not according to Jewish law; for with us it is

lawful for a husband to do so; but a wife, if she departs from her husband, cannot herself be married to another, unless her husband put her away. Salome chose to follow, not the law of her country, but the law of her own will, and so renounced her marriage."]

b. The cause for which a wife might be put away seems to be less indefinite than some of the rabbis chose to consider it. The marginal reading, *matter of nakedness*, in (1) certainly seems to imply some moral impurity; and it is evident from (4) that ante-nuptial unchastity was one cause of divorce while in (9) and (10) adultery is the cause.

c. Before the time of Christ the law had come to be very loosely interpreted. Josephus (Ant. i. 8, 23), gives the current understanding of it in these words: "He who desires to put away his wife for any cause whatsoever (and many such causes happen among men), let him in writing give assurance that he will never use her as his wife any more." For the present purpose, it suffices to observe that while some of the rabbis maintained that the right of divorce could exist only in the case of some moral delinquency of the woman, others asserted that a man might put away his wife for the most trivial cause, or even without cause, if he saw another woman whom he preferred.

d. In the obscure passage from Malachi (11), if we adopt the marginal reading, *if he hate* her *put* her *away*, the reason of the permission is that otherwise her husband may "cover violence with his garment," or, in other words may secretly contrive his wife's death. If he does put her away, he "deals treacherously with the wife of his youth," and God, who allowed divorce on account of "the hardness of men's hearts," must have both reprobated their cruelty and "hated putting away."

e. It is possible that the bill (or *book*) of divorcement, was

originally intended as a protection to the wife. Josephus says that in his time one of its objects was to set the woman free to marry, and to facilitate her marriage by the assurance that her husband would have no further connection with her; but it is possible that another purpose was contemplated by the lawgiver. The art of writing being practised by few of the people besides the priests, the husband must generally have applied to a priest to draw up the bill of divorcement. Whether a statement of his grievance was to be included in the bill or not, such a statement would generally be made, and if it was altogether trivial and insufficient, we may suppose that a righteous priest would refuse to be the accomplice of a wrong against a daughter of Israel. It must be admitted, however, that the right to judge of the sufficiency of the cause of divorce is left by the letter of the law to the husband alone.

f. From (6) and (8), and also from 1 Esdr. ix: 36, it appears that, in some cases at least, the children of the divorced woman were sent away with her, but whether she had a *right* to the custody of her children is not apparent.

g. In her status she was classed with widows, (5), (6), and she was free from control as widows were (7).

h. Hence she was free to marry another husband, whatsoever the cause of her divorce might have been (1), (2), (5).

i. But if she married another man, she could never again be the wife of her former husband (1), (9).

k. And if her husband had so misused her (3), or slandered her (4), that another man would not be likely to marry her, he forfeited his right of divorce.

l. In (9) and (10) we observe that the idolatries of Israel are expressly called adulteries against God; a metonymy which was afterwards extensively applied by fathers of the church.

B. The Roman Law.

§ 1. Under the ancient law of Rome there was never any question of the right of a husband to put away his wife; but, like the right of a father to sell his children into slavery, it was so seldom exercised that the first instance of divorce, if we may believe Aulus Gellius (iv. 3; xvi. 21), occurred not earlier than A. C. 234; when Spurius Carvilius Ruga divorced his wife for the cause of barrenness.

§ 2. As the consent of parents was necessary to a marriage, so, while they lived, their consent was equally necessary to a divorce.

§ 3. No judicial action or other formality was necessary to a divorce, more than to the temination of any other contract. Among the Romans some words were necessary in all transactions, and in divorce the words "*Tuas res tibi habeto; tuas res agito*", (Take your own property; mind your own affairs), were sufficient to put an end to the marriage.

§ 4. Persons who had been married by confarreation, however, could not be divorced without a solemn and symbolic ceremony called *Diffarreation;* nor could persons married by coemption be separated without a corresponding ceremony called *Remancipation*.

§ 5. In the latter days of the Republic divorce had become common, and was practised by persons of the most exalted station, *e.g.* by Cicero and Pompey.

§ 6. As the practice became common, questions of property involved in marriage required the attention of law; the dower of a wife and donations made by a husband to a wife being always an important part of

the Roman contract of marriage. Hence a written notice of divorce came to be customary.

§ 7. With the frequency of divorce, the right of the wife to abandon a husband came to be recognized as equal to the husband's right to put away his wife; though public opinion in many places disapproved of its exercise.

§ 8. In breaking a marriage a person was said to *make a divorce* (*divortium facere*), or simply to *send a message* (*nuncium remittere*); and in breaking off a betrothal the terms were *renunciare*, *mittere*, *dicere repudium*, or simply *repudiare*; but the distinction of terms was not strictly observed.

§ 9. By the *lex Julia de adulteriis*, seven adult persons (*puberes*), and at least one freedman (*libertus*) of the party making the divorce were required to be witnesses of the transaction.

§ 10. Under the Christian empire the permission of divorce was sufficiently liberal. By a law of Theodosius and Valentinian, A. D. 449 (Justin. Cod. v. 17, 8), the wife might divorce her husband for any of the following causes: adultery (which in the language of the law meant carnal copulation with another *married* woman), homicide, poisoning, treason, forgery, violation of graves, sacrilege of churches, committing or abetting robbery, cattle-stealing, kidnapping, associating with lewd women, conspiracy against his wife's life, or the personal violence of blows (*verbera*) which a free woman may not endure.

§ 11. By the same law a husband might divorce his wife for adultery, poisoning, homicide, kidnapping, violation of graves, sacrilege of churches, abetting

robbery, joining in feasts with strange men against her husband's will or without his knowledge, spending the night abroad against his will or without good and sufficient reason, attending the circus or theatre against his will, conspiring against his life, concealing treason against the empire, forgery, or striking her husband.

§ 12. In A. D. 497, a law of Anastiasius restored the right of divorce by joint consent of the parties for causes satisfactory to themselves; the woman, however, to remain unmarried for a year (Justin. Cod. v. 17, 9).

§ 13. Justinian (A. D. 542), reduced the number of causes for which there might be a divorce (Nov. 117, 8). The causes in a wife were these: concealment of treason, adultery, conspiracy against her husband's life, feasting or bathing with strange men against her husband's will, staying abroad against her husband's will, except at the house of her parents, and attending the circus, the theatre, or a hunting party against his will or without his knowledge.

§ 14. By the same law (cap. 8) the causes for which a husband might be divorced were these: treason, conspiracy against his wife's life or an attempt to prostitute her, a false accusation of adultery made against her, fornication in his home, and keeping a mistress whom he obstinately refused to abandon.

§ 15. By the same law (cap. 10) divorce by the joint consent of the parties was prohibited, except in the case that one of them intended to enter on a celibate life.

§ 16. But by a law of Justin II. in A. D. 566 (Nov.

140), the old right of divorce by joint consent was restored, though with great reluctance on the part of the emperor, on the ground that many dissensions had arisen in families, and that poisoning and assassination had in certain cases taken the place of divorce.

§ 17. It is hardly necessary, perhaps, to say that in the Roman, as in the Hebrew law, there was no distinction between a separation *a mensa et thoro* and a divorce *quoad vinculum*. A woman who was put away, no matter what the cause of her divorce might be, was free to "go and be another man's wife." It is true that a law of Honorius (circ. A. D. 400) required a woman who divorced her husband for good reasons to wait five years before marrying again, while a man who put away his wife for like reasons might marry at once. It is also true that by the same law a man who divorced his wife for slight reasons was obliged to wait two years before he married again; and that if he had no cause for the divorce, he was deprived of the right to marry again, while the injured wife might marry again after a year (Cod. Theod. iii. 16, 2). This law, however, was entirely without precedent in the earlier laws of Rome, and it was not sustained by subsequent legislation; so that it may properly be said in general terms that all divorces under the civil law of Rome were absolute divorces *quoad vinculum*.

C. The Law of the New Testament.

§ 1. The sayings of our Lord concerning divorce are contained in the following passages:

Matt., 31 32: v. It hath been said, Whosoever shall put

away his wife, let him give her a writing of divorcement; but I say unto you, that whosoever shall put away his wife saving for the cause of fornication, causeth her to commit adultery;[1] and whosoever shall marry her that is divorced (Gr. *a divorced woman*) committeth adultery.

Matt. xix: 3–12. The Pharisees also came unto him tempting him, and saying unto him, Is it lawful for a man to put away his wife for every cause?

And he answered and said unto them, Have ye not read that he which made them at the beginning made them male and female, and said, For this cause shall a man leave father and mother, and shall cleave unto his wife, and they twain (West. Ver., *the twain*), shall be (West. Ver., *shall become*) one flesh. Wherefore they are no more twain, but one flesh. What, therefore, God hath joined together, let not man put asunder.

They say unto him, Why did Moses, then, command to give a writing of divorcement, and to put her away?

He said unto them, Moses, because of the hardness of your hearts, suffered you to put away your wives; but from the beginning it was not so. And I say unto you, Whosoever shall put away his wife except it be for fornication and shall

[1] I am not one of those who denounce the Westminster revision. It has accomplished a work which no clamor of railing accusation can ever undo. In these pages I have used it freely whenever I thought it brought out the sense of the original more clearly than the authorized version. But I cannot pass by its egregious mistranslation of this passage without remonstrance. The authorized version is right; the Westminster version (*maketh her an adulteress*) is not right. It is an offence against the original; it is an offence against the rules of the translators themselves; and I will venture to add that this and an equally unpardonable error in Matt. v: 32 are an offence against the church, which has a right to expect that the revisers have observed the rules of critical uniformity by which they profess to have been governed.

marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery.

His disciples say unto him, If the case of a man be so with his wife, it is not good to marry.

But he said unto them, All men cannot receive this saying, save they to whom it is given. For there are some eunuchs which were so born from their mothers' womb; and there are some eunuchs which were made eunuchs of men; and there be eunuchs which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it.

Mark x: 2–12. And the Pharisees came to him, and asked him, Is it lawful for a man to put away his wife? tempting him. And he answered and said unto them, What did Moses command you? And they said, Moses suffered to write a bill of divorcement, and to put her away.

And Jesus answered and said unto them, For the hardness of your hearts he wrote you this precept; but from the beginning of the creation God made them male and female. For this cause shall a man leave his father and mother and cleave unto his wife, and they twain (West. Ver., *the twain*) shall be (West. Ver., *become*) one flesh. What therefore, God hath joined together, let no man put asunder.

And in the house his disciples asked him again of the same matter.

And he saith unto them, Whosoever shall put away his wife and marry another, committeth adultery against her. And if a woman shall put away her husband and be married to another, she committeth adultery.

Luke xvi: 18. Whosoever putteth away his wife, and marrieth another committeth adultery; and whosoever marrieth her (Gr. *a woman*) that is put away from her husband committeth adultery.

§ 2. I can make no pretension to such exegetical and

critical acumen as would enable me to resolve the difficulties which have been raised, reasonably and unreasonably, in the interpretation of these sayings of our Lord; and with the most careful condensation, many such books as this might be filled with the contradictory arguments of theologians and canonists, concerning words which certainly do not, at first sight, seem to be obscure. All I shall attempt to do will be to determine the standpoint of our Lord's discourse concerning marriage; to ascertain the meaning of his peculiar use of the words *adultery* and *fornication;* and then to translate, if I may so speak, his divine aphorisms into the language of ordinary discourse.

§ 3. Our Blessed Lord regarded marriage, and professed to regard it, — I speak reverently, — from the standpoint of God; that is to say, as it had been conceived and planned by the Logos "in the beginning." We have already seen above (pp. 13–15) that the divine ideal of marriage includes conjugal chastity in a unity which is at once exclusive and indissoluble. Therefore when our Lord speaks of any one of these particulars, we are to understand the other particulars to be implied, unless they are expressly excluded; *e.g.*, when he speaks of the indissolubility of marriage, we are to understand that exclusiveness and chastity have been observed, unless the contrary is expressly postulated.

§ 4. Our Lord gives an authoritative interpretation of the "uncleanness," or "matter of nakedness" (Deut. xxiv: 1), for which a man might put away his wife He does not deny that the law of Moses,

by the use of language which was perhaps intentionally obscure, had authorized the Israelites to put away their wives for causes which were in themselves sufficient; but he declares that this was an economy intended to prevent, possibly, the greater evil of wife-murder, to which the "hardness of their hearts" might have tempted them (see above, in the Scholium on the Hebrew law, section *d*); but looking back to "the beginning" (Matt. xix: 8, 9), he declares that nothing but an offence against chastity can rupture the otherwise indissoluble bond of marriage, so as to justify divorce.

§ 5. The word *adultery*, as used in the sayings of our Lord bears a new sense. Both in the Hebrew and in the Roman law, adultery signified illicit sexual intercourse with a married woman only; the similar intercourse, even of a married man, with an unmarried woman, being merely fornication, and not the more heinous crime of adultery. In Mark x: 12, our Lord extends the use of the word so as to include the sin of an unchaste husband against his wife: "Whosoever shall put away his wife and marry another (*i.e.*, *any* other) committeth adultery against her." It was centuries, however, before the equality of the offence of adultery in man and woman was unequivocally admitted even by Christians.

§ 6. The word *fornication* is also used by our Lord in a peculiar way. Its ordinary use in the New Testament, as in classical Greek, is to designate an act of unchastity by a man, whether married or unmarried, with an unmarried woman. In the *woman* it

generally conveys the idea of meretricious unchastity, or prostitution. In 1 Cor. v: 1, it is used with reference to incest with a father's wife, and consistently so, since it is to be presumed that neither of the guilty parties had a living partner at the time of their sin. Our Lord, however, uses the word in connection with the sin of a *married* woman.

§ 7. Eminent divines and theologians have maintained that our Saviour used the word in its strict sense of sin before marriage; and that the only "cause of fornication" for which he permitted divorce was the ante-nuptial fornication contemplated in Deut. xxii: 13–19. The objection to this opinion is that there is nothing, either in the context or in the occasions of our Saviour's discourse, to suggest it; but rather the contrary, since, in the sermon on the mount he was speaking of general laws and laying down general propositions, and in Matt. xix: 3–12, he was answering the very general question whether it was lawful for a man to put away a wife for *every* cause.

§ 8. Nevertheless, the distinction between adultery and fornication is so closely observed in the New Testament, that our Saviour can hardly be supposed to have used the latter word otherwise than advisedly. The subject is difficult to treat even in a work in which plainness of speech cannot be avoided; but it may be said, shortly, that since the word fornication, when applied in the Greek tongue to a woman, generally conveys the idea of *meretricious* sin, our Saviour probably meant to teach that if a married woman committed *any* of the nameless uncleannesses which belong to the

filthy trade of the harlot, it would be a just cause of divorce, whether it were or were not the very act by which her husband might be made the reputed father of spurious children.

§ 9. We may now proceed to analyze our Lord's aphorisms, beginning with Matt. v: 31, 32: —

The subject is the Mosaic allowance of divorce.

Our Lord, in effect, declares that unless the wife has failed in the indispensable condition of chastity, by conduct which may be justly called fornication, the husband has no right to put her away.

It follows that if he put her away without right, she remains his wife notwithstanding the bill of divorcement served upon her.

It follows, also, that her husband, who, in the language of the customary formula, sends her away to be "another man's wife," virtually assigns her to an adultery for which he himself is responsible.

And since she is still his wife, it necessarily follows that any other man who marries her enters into an adulterous connection with a married woman.

§ 10. We next examine Matt. xix: 3–12.

The Pharisees propose the question whether divorce is lawful for *every* cause.

Our Lord replies in general terms, that since by the will of the Creator marriage is indissoluble, the general presumption is against any divorce. What God hath joined together man may not put asunder.

The objection is raised that Moses *did* allow of divorce.

Our Lord explains that this was an economy, "because of the hardness of their hearts;" but asserts that it "was not so from the beginning." He declares that if a man put

away a wife who has not failed in the indispensable condition of chastity, the woman is still his wife, and the exclusiveness of marriage is such that if he marries another the second union is adulterous. It follows, also, as in the previous discourse, that the woman being still his wife, any man who marries her commits adultery.

The disciples think that if this is the true law of marriage it is better not to marry.

Our Lord does not contradict them, but says that the gift of continence is not given to all. They who can receive it are to do so. Clement of Alexandria (Strom. iii), understands this saying of our Lord to refer to the previous teaching concerning divorce; but such an understanding of it would lead, I think, to conclusions which S. Clement would certainly not have admitted.

§ 11. We proceed to Mark x: 2–12.

The Pharisees propose a question on the lawfulness of divorce in general, without reference to the cause.

Our Lord, as before, declares that because of the unity and indissolubility of marriage as instituted by the Creator "from the beginning," divorce is, generally, *not* lawful.

To the subsequent inquiries of the disciples concerning the effect of an (arbitrary) divorce, he declares that whether it be the act of the husband or of the wife, it is null. The woman continues to be the man's wife, so that if either of them violates the exclusiveness of the dual unity of marriage by marrying another, it is not marriage but adultery.

§ 12. In Luke xvi: 18, as in Mark x: 2–12, the subject is divorce *per se*, or arbitrary divorce, no cause being assigned or contemplated.

Our Lord declares that it is null. The parties are still

man and wife, so that if either of them marries again the new association is adulterous.

§ 13. Our Lord's teaching is briefly this: —

a. There is no sufficient cause for the divorce of a wife except such uncleanness on her part as may justly be called fornication.

b. Any divorce for other cause is void, and the parties remain man and wife in the sight of God, as they were before.

c. Hence a second marriage of either party after an invalid divorce is not marriage but adultery.

d. And the person who marries either party after an invalid divorce is guilty of adultery.

e. The lawfulness of the marriage of the innocent party after a just divorce may perhaps be inferred from our Lord's silence concerning it, but it is not explicitly declared.

f. Of a second marriage of the guilty party there is no suggestion.

g. It cannot fail to be observed that our Lord does not *commend* divorce under any circumstances; still less does he *commend* the marriage, even of an innocent party after a just divorce; the general tendency of his teaching is to discountenance the one and the other.

§ 14. In the writings of the apostles there are but three passages which bear upon this subject. One of them (1 Cor. vii: 12–17), has been already treated under the impediment of *Religion*. The other two are here given.

Rom. vii: 2. The woman which hath a husband is bound by the law to her husband so long as he liveth; but if the husband be dead, she is loosed from the law of her husband.

1 Cor. vii: 10, 11. Unto the married I command, yet not I but the Lord. Let not the wife depart from her husband,

but and if she depart let her remain unmarried, or be reconciled to her husband, and let not the husband put away his wife.

§ 15. In the former of these two passages, the indissolubility of marriage is plainly asserted. In the latter, though it does not appear that the exceptional "cause of fornication" was present to the mind of the apostle, even a separation *a mensa et thora* is earnestly discouraged.

D. Canons, Decrees, etc.

405. *Hermas*, (circ. A. D. 100–150), Pastor, Mand. iv. 1. And I said to him, "Sir, if any one has a wife who believes in the Lord, and if he detect her in adultery, does the man commit sin if he continue to live with her?" And he said to me, "As long as he remains ignorant of her sin, the husband commits no transgression in living with her; but if he knows that his wife has gone astray, and if the woman does not repent, but continues in her fornication, and he then continues to cohabit with her, he is a partaker in her crime, and a sharer in her adultery.

406. Ibid. And I said to him, "What then, sir, is the husband to do, if his wife continue in her vicious practices?" And he said, "The husband should remain by himself, and put her away. But if he put his wife away and marry another, he also commits adultery."

407. Ibid. And I said to him, "What if the adulterous woman should repent, and wish to return to her husband? And he said to me: "Assuredly the husband . . . ought to take back the sinner who has repented; but not often; for there is but one repentance to the servants of God."

408. Ibid. In case, therefore, that the divorced wife may

repent, the husband ought not to marry another after he has put away his wife; and, in this matter, man and woman are to be treated exactly alike.

409. Ibid. Moreover, adultery is committed not only by those who pollute their flesh, but by those who imitate the heathen in their actions. [The Vatican copy reads, "But he who makes an image also commits adultery."]

410. *Athenagoras.* (circ. A. D. 177), Apologia, cap. 33. A person shall either remain as he was born, or be content with one marriage; for a second marriage is only specious adultery. "Whosoever putteth away his wife," saith He, "and marrieth another, committeth adultery," not permitting a man to send her away whose virginity he has brought to an end, nor to marry again. He who separates himself from his first wife, even though she be dead, is a covert adulterer, resisting the hand of God, because, in the beginning, God made one man and one woman.

411. *Clemens Alex.* (circ. A. D. 200), Strom. ii. 23. But that the Scripture counsels marriage, and does not allow its union to be forsaken, it has openly declared in the law: "Thou shalt not put away thy wife except for fornication." And it holds a second marriage of either of two separated persons, during the lifetime of the other, to be adultery.

412. Ibid. Strom. iii. c. i. The followers of Basil say that when the Apostles asked our Lord whether it were better for a man not to marry, the Lord answered: "All men cannot receive that saying, for there are eunuchs," etc., c. 6. But they fail to observe that this was said after He had spoken concerning divorce. When some had asked him: "If the case of a man be so with his wife, it is not good to marry;" then the Lord answered: "All men cannot receive this saying, but they to whom it is given." What they had

desired to know was whether he allowed a man to marry after he had condemned and put away his wife.

413. *Tertul.* (circ. A. D. 200), Adv. Marcion. iv. 34. Christ prohibits divorce, saying: "He who puts his wife away and marries another, commits adultery, and he who marries her that is put away commits adultery." Thus, He both forbids divorce and the marriage of a divorced woman. . . . But he prohibited divorce conditionally; that is to say, in the case of a person who puts away one wife in order to marry another. He who puts away his wife *and marries another*, commits adultery; he who marries her who is put away is equally an adulterer for the same reason, since she may not be put away in order to marry another man. She who is not lawfully put away is not put away, and he who marries her is an adulterer. A marriage that is not justly broken stands; and to marry one whose marriage stands is adultery. Thus, what he prohibits under a certain condition, he does not absolutely disallow, and what he does not absolutely disallow he permits (in certain cases). . . . So that the righteousness of divorce is maintained by Christ; and Moses must be held to have been sustained by Him, since Moses and Christ permit divorce in the same sense, namely, if any unchastity occur in the wife. . . . Save for the cause of adultery, the Creator does not put asunder those whom he has joined together; and if Moses ordained that he whose marriage was begun by violence (*ex compressione*) might not put away his wife forever (Deut. xxi:i28, 29), how much more shall a marriage stand which has been contracted by a voluntary agreement. [Tertullian, who barely allowed a second marriage after the death of one of the parties to be lawful (de Monogamia, *passim*), could not, of course, tolerate the marriage of any divorced person.]

414. *Cyprian.* (circ. A. D. 250), de Discip. Cast. c. 6. When our Lord was questioned, he said that a wife must not

be put away save for the cause of adultery; such honor did he put upon chastity.

415. *Ap. Can.* No bishop, presbyter, or deacon, shall put away his wife under pretext of religion; but if he put her away, let him be suspended, and if he persist, let him be deposed.

416. c. 48. If any layman put away his wife and take another, or if he marry a woman divorced by another man, let him be suspended.

417. *Conc. Eliberit.* (A. D. 305), c. 5. Women who shall abandon their husbands without previous reason (*nullâ præcedente causâ*) and couple themselves (*se copulaverint*) with other men, shall not be received to communion, even at their end.

418. c. 9. Moreover, a Christian woman who shall abandon an adulterous husband who is a Christian, shall be forbidden to marry again; and if she marry, she shall not receive the communion until he whom she has married is dead, unless the necessity of grievous sickness require it to be given to her.

419. cc. 10 and 11. These canons must be taken together; (I follow the interpretation of Hefele). If an (unbaptized) woman shall be abandoned by a catechumen, and shall afterwards marry another man, she may be admitted to baptism; and the like rule shall be followed if an unbaptized man be abandoned by a wife who is a catechumen. And if a Christian woman shall marry the man who has abandoned a blameless wife, knowing that he has abandoned his wife without cause, she shall be admitted to communion only at death; but if she be only a catechumen, baptism is not denied to her, if she be grievously sick.

420. c. 24. It is decreed that a man shall by all means be prevented from dismissing his wife in order to take another

in her place; and whoever shall do so shall be cut off from catholic communion.

421. c. 65. If a clergyman shall know his wife to be an adulteress, and shall not instantly put her away, he shall not be permitted to receive the communion, even on his death-bed; lest lessons of wickedness be given by the very persons who ought to afford an example of good behavior.

422. *Conc. Ancyr.* (A. D. 314), c. 14. If any woman shall forsake her husband, and resolve to depart from him beeause she abhors marriage, let her be anathema.

423. *Conc. Arelat.* (A. D. 314), c. 10. Concerning those who detect their wives in adultery, though they be young men and Christians, they are forbidden to marry again, and it is resolved to counsel such that they be strongly advised (*ut in quantum possit consilium iis detur*) not to take other wives during the lives of their former wives, adulteresses though they be.

424. *Conc. Neo-Cæsar.* (A. D. 314–323), c. 8. If the wife of a layman has committed adultery and been clearly convicted, her husband cannot enter the ministry, and if she commit adultery after his ordination, he must put her away; or if he retain her, he can have no part in the ministry committed to him.

425. *Lactantius*, (circ. A. D. 320), Inst. vi: 23. The divine is not like the civil law, which holds that none but a married woman can commit adultery, while her husband, however many women he may take, does not commit adultery. The divine rule, so joins the twain in marriage, that is to say in one body, under an equal law, that he is an adulterer who rends apart the union of that body.

425. *S. Ambrosius.* (A. D. 333–397), de Abr. Patr. i: 4. Let no man deceive himself with human laws which declare that adultery is not committed with a single woman, but only

with one who is a wife. Every unlawful sexual commerce (*stuprum*) is adultery; and what is unlawful in a woman is unlawful in a man. The same chastity is due by the husband as by the wife, and any sin committed with a woman who is not his lawful wife is condemned as the crime of adultery.

427. Idem. (*sea potius* Hilar. Diac. in 1 Cor. vii: 10, 11). It is not lawful * * * for a woman to marry if she put away her husband for fornication.

428. *S. Basil.* (A. D. 370), c. 9. The law of Christ forbids divorce equally to man and woman, saving for the cause of fornication, though custom requires women to retain their husbands, even when guilty of fornication. A man who is deserted by his wife may marry again; and even if he was divorced for adultery, St. Basil is not certain that the second wife is guilty of adultery. A wife who is divorced may not marry, and neither may a man who has divorced an innocent wife.

429. c. 21. If a married man has carnal knowledge of an unmarried woman he is guilty of fornication, and ought to be severely punished, but there is no canon which requires him to be treated as an adulterer, and a wife ought to cohabit with such a husband. But if a wife is guilty of adultery she is divorced, and a man who retains such a wife is held to be impious. Such is the custom, but the reason of it does not appear.

430. c. 31, (afterwards confirmed by the 93d Trullan canon). A woman whose husband is absent and who marries another without certain assurance of her husband's death is guilty of adultery.

431. c. 35. If a woman deserts her husband without reasonable cause, she is to be punished.

432. c. 36, (afterwards approved by the 93d Trullan canon). A soldier's wife marrying after long absence of

her husband, but without certain assurance of his death, is more excusable than another woman, because his death is probable.

433. c. 37. He who has the wife or the betrothed wife of another man taken away from him, and marries another, is guilty of adultery with the first, not with the second.

434. c. 39. She who lives with an adulterer is guilty of continuous adultery as long as the connection lasts.

435. c. 46, (afterwards confirmed by the 93d Trullan canon). A woman who has married a man deserted by his wife, and who is afterwards dismissed upon the wife's return, has been guilty of fornication, though ignorantly. She may marry, if she will, but would do better to remain unmarried.

436. c. 47. A woman dismissed by her husband, in my judgment, ought to remain unmarried.

437. c. 77. A man who divorces his wife and marries another is an adulterer.

438. *Timothy of Alexandria.* (circ. A. D. 380), c. 15. Question: If a man's wife is possessed to such a degree that it is necessary to chain her, and if he cannot contain, may he marry another? Answer: I can only say that it would be adultery if he did.

439. *S. Hieron.* (A. D. 340–420), Ep. ad Amand. c. 3. So long as a man lives, though he be an adulterer, or a sodomite, or swallowed up in every conceivable vice, and though his wife may have left him because of these crimes, he is yet held to be her husband, and it is unlawful for her to take another man. * * * He who marries a divorced woman is an adulterer; whether her husband divorced her or she was divorced by her husband, he who marries her is an adulterer; and, while her husband lives, the woman is an adulteress, if she marries another man.

440. Idem. Com. in Matt. xix:9. Wheresoever, there-

fore, there is fornication or suspicion of fornication, the wife may be freely put away; but because it might happen that some one should slander an innocent woman, or even allege a crime against her in order to clear the way for a second marriage, therefore, he is required to put away the first wife only on this wise, that he shall have no other while the first lives.

441. *S. Augustin.* (circ. A. D. 400), in sermon. Domini in monte I. 27; 28. The idolatry practised by unbelievers is fornication, and the Lord permitted the man to put away his wife for the cause of fornication. What he permitted, however, he did not command; and so he left it open for the apostles to advise that a man should not put away an unbelieving wife, in the hope that she might perchance become a believer. If, then, unbelief is fornication, and if idolatry is unbelief, and if covetousness is idolatry, beyond all question covetousness is fornication; and if covetousness is fornication, who shall say that any unlawful lust is generically different from fornication? From this we may understand that a husband may lawfully put away a wife, or a wife may put away a husband, not only for unlawful lusts which defile the body, but for any pernicious and degrading lust by which the soul is led to misuse of the body and alienation from the law of God. For the very reason that the Lord has made an exception of the cause of fornication, we must understand that exception to be generic and inclusive (*generalem et universalem*), and when he says "save for the cause of fornication," we are to remember he does not tell us *whose* fornication is meant, whether the wife's or the husband's. Either of the two may be intended; and we are not only at liberty to put away a fornicating wife, but the man who puts away a wife by whom he is himself led into fornication, certainly puts her away "for the cause of fornication," as is the case when a man is constrained by his wife to

offer sacrifice to idols. And the man who puts such a woman away, puts her away "for the cause of fornication" in her and in himself, too; in her, because she is guilty of fornication; and in himself, that he may not be guilty of it. [In his Retractions, however, St. Augustine confesses serious doubts of his earlier opinions on this subject, and speaks of it in these terms (Retract. I. xix:6): How far we are to understand this fornication to extend, and what are its just limitations, and whether it is lawful to put away one's wife on account of it, is a very obscure question (*latebrosissima quæstio*)].

442. Ibid. cap. 28. There is nothing more iniquitous than that a man who is guilty of fornication should put away his wife for the cause of fornication. He who would put away his wife for that cause ought to be free from the same offence, and I would say the same of a wife putting away her husband.

443. Idem. De conj. adult. lib. I. cap. 18. It may chance that a Christian who has put away his wife for the cause of fornication shall be tempted by a woman who has not yet embraced the faith, but who promises to become a Christian, not hypocritically but sincerely, if he will marry her. To such a man the tempter may make these suggestions: The Lord has said, whosoever putteth away his wife save for the cause of fornication, and marrieth another, committeth adultery; but you who have put away your wife for that cause will not commit adultery if you marry another. To such a suggestion, let him answer out of a well-instructed heart, that he is, indeed, guilty of a more heinous adultery who marries another after putting away a wife without the cause of fornication; but that he who puts away a wife for that cause, cannot be acquitted of adultery, if he marries again; just as he is certainly guilty of adultery who marries a woman who has been put away but not for the cause of

adultery, while he is not to be acquitted of adultery who marries a woman who has been put away for that cause; and because the language in Matthew is somewhat obscure, it is more fully expressed in Mark: "Whosoever putteth away his wife and marrieth another, committeth adultery," and likewise in Luke. It is not said that some commit adultery and that others do not, but that whosoever putteth away his wife and marrieth another, he, without exception, committeth adultery.

444. Ibid. lib. II. cap. 4. A woman cannot begin to be the wife of a second husband until she has ceased to be the wife of the first; and she will cease to be his wife if he shall die, but not because he commits adultery.

445. [But St. Augustine seems in his later days to have had doubts of the justice of some of his earlier views on this subject. Thus he writes as follows in his Retractions (ii: 57): "I wrote two books on the subject of Adulterous Marriages, with the object of solving that most difficult question by the Holy Scripture. Whether I did it as clearly as I might, I am not sure, though I may have opened some of its recesses. The intelligent reader will be able to judge for himself."]

446. *Innocentius*, *Papa* (A. D. 402–417), Epist. III. ad I. Exuperium, cap. 4. You have asked why men who are communicants will not consort with adulterous wives, while wives, on the contrary, continue to consort with adulterous husbands. The Christian religion condemns adultery equally in both sexes; but women do not readily accuse their husbands of adultery, and secret crimes pass without punishment. Men, however, are wont to accuse their wives who have sinned, and when the sin is revealed, the women are punished. Thus adulterous husbands are not excommunicated because their sin is not known, but they are to be ex-

pelled if the crime is disclosed. The guilt in either case is the same though justice fails for lack of evidence.

447. Ibid. c. 6. It is manifest that when persons who have been divorced marry again both parties are adulterers. And moreover, although the former marriage is supposed (*videatur*) to be broken, yet if they marry again they themselves are adulterers, but the parties whom they marry are equally with them guilty of adultery; as we read in the gospel: *He who putteth away his wife and marrieth another committeth adultery;* and likewise, *He who marrieth her that is put away from her husband committeth adultery.* Therefore all such are to be repelled from communion.

448. *Conc. Milevit.* (A. D. 416), c. 17. According to the evangelical and apostolic discipline it is decreed that neither a man who is put away by his wife, nor a woman put away by her husband, may marry another, but that they must either abide so, or be reconciled to each other.

449. *Leo. I., Papa* (A. D. 440–461), Epist. ad Rustic. Beyond all doubt a woman who has not received conjugal service (*ministerium conjugale*) does not belong to the married state (*non pertinere ad matrimonium*).

450. Idem. Epist. ad Nicet. Aquil, Ep. Declares that if men are enslaved and long absent or even supposed to be dead, and if their wives are left destitute and driven by poverty to marry again, yet if the husbands return after a long captivity, and are so persevering in their love for their wives as to desire them to return to their former union, the wives must return accordingly. If the wives refuse, they are to be excommunicated and held infamous.

451. *Conc. Andegav.* (A. D. 453), c. 6. They who abuse the name of marriage by taking women whose husbands are living shall be excommunicated.

452. *Conc. Agath.* (A. D. 506), c. 25. If laymen for-

sake their marital connection without grave reason, or if any shall hereafter forsake it without exhibiting probable cause for their conduct, but abandon their marriages in order to engage in strange or unlawful connections; that is to say, if they shall put away their wives before they have submitted their cause to the bishops of the province, and before the wife has been judicially found guilty, let them be shut out from the communion of the holy church and from the congregation of the people because they are defilers of the faith and of marriage.

453. *Conc. Aurelian. II.*, (A. D. 536), c. 11. Uncongenial marriages, even though sickness occur, shall not be dissolved on account of any uncongeniality of temper; and, if any shall be separated from their wives, let them know that they shall be deprived of communion.

454. *Conc. Nannet.* (*tempore incerto*, *forsitan* A. D. 658), c. 12. An adulteress shall do public penance for seven years; and if her husband has put her away and is afterwards reconciled to her, he shall do penance with her; and after seven years both shall be received to communion.

455. *Conc. Herford.* (A. D. 673), c. x. Let no man forsake his wife save, as the gospel saith, for the cause of fornication. If any man have sent away his wife, legally wedded, if he would be a Christian, let him either abide so, or be reconciled to his wife.

456. *Conc. Tolet. XII.* (A. D. 681), c. 8. The Lord hath commanded that, save for the cause of fornication, a wife shall not be put away by her husband. Therefore, if any man have put away his wife for any other cause, because he hath put asunder those whom God hath joined, he shall be excommunicated and deprived of Christian society, until he shall sincerely embrace and cherish the companionship of his forsaken wife. And if any man in such circum-

stances, after being therein admonished by the priest, will not return to the bed of his wife, he shall lose any public office he may hold, and, if he be a noble, he shall forfeit his rank, so long as he remains contumacious.

457. *Conc. Trull.* (A. D. 691), c. 87. A woman who leaves her husband and marries another is an adulteress; and a man who leaves his lawful wife, and takes another is an adulterer. In such cases a regular penance of six years is prescribed, at the end of which the offender may be admitted to communion, if he repent with tears.

458. c. 93. Renews and confirms the 31st, 36th and 46th canons of St. Basil, and adds that if a soldier whose wife has married during his long absence returns, he may take his wife again; but the wife and the man with whom she has cohabited are not to be punished, as they sinned ignorantly.

459. *Gregorius, II., Papa* (A. D. 715–731) Epist. ad Bonifacium. Your second question is this: If a woman be seized with infirmity so that she cannot render the conjugal debt to her husband, what shall the man do? We answer that it would be well for him to abide so and observe continence; but since this is exceedingly difficult, let him who cannot contain marry rather than sin; nevertheless he is not to withdraw his support from her who is suffering from infirmity and not dismissed for any detestable crime.

460. *Conc. Vermer.* (A. D. 753), c. 5. If a woman have conspired with others against the life of her husband, and the husband in self-defence has slain one of the conspirators, then, if he can prove the facts, he may put away his wife, and marry another, if he will. But the woman shall be subjected to penance, and shall never marry another.

[This canon admitted into the Corpus Juris. Dec. Greg. IX. tit. xix. De Divortiis, cap. I., is corrupted

by the insertion of the words "*post mortem uxoris*" which prohibits the man from marrying again until after the death of the woman who has conspired to assassinate him. The canon, too, is wrongly ascribed to the Council of Worms.]

461. c. 9. If a married man is compelled by inevitable necessity to remove into another duchy or province, and his wife being well and able refuses to follow him, she shall remain unmarried as long as the husband lives. (So much of this canon is received into the Decretum (Pars II. caus. xxxiv. q. 1 c. 4), but the remainder which permits the deserted husband to marry again, though under condition of penance, if he sees no hope of returning home, is omitted.

462. *Conc. Compend.* (A. D. 757), c. 13. If any man has dismissed his wife and given her leave to serve in a monastery for the sake of religion, or if he has granted permission for her to live under vows outside of a monastery, for God's sake, as we have said, the husband may take a lawful wife; and likewise in the case of a woman (who has released her husband).

463. c. 18. If any persons, on account of enmity at home take refuge in a foreign country, and put away their wives, neither those husbands nor their wives shall marry again.

464. c. 16. If a leper have a healthy wife, and if he is willing to give her leave to take another husband she may take one, if she will.

465. *Conc. Forojul.* (A. D. 791), c. 10. Though a man break the bond of marriage for the cause of fornication, nevertheless he shall not marry again while his wife lives, adulteress though she be; and the adulteress shall never marry another husband. For we learn from the commentaries of St. Jerome that the words of the gospel "save for

cause of fornication" refer exclusively to the right of putting the wife away.

466. *Nicolaus I., Papa.* (A. D. 858–867), Epist. ad Carol. Mogunt. Ep. If madness, or insanity, or sickness occur in either party after a marriage, the marriage cannot be dissolved on that account. The rule holds good if a person has his eyes put out, or his limbs lopped off, or even if he is castrated.

467. *Alexius, Constantinopol. Patriarcha.* (A. D. 1025–1043. 1.[1] No clergyman is to be condemned for giving the benediction at the marriage of a divorced woman, when the man's conduct was the cause of the divorce.

468. 2. Women divorced by men whose conduct has been the cause of the divorce are not to be blamed if they choose to marry again; nor are the priests to be blamed who give them the benediction. So, too, with regard to men.

469. 3. Whoever marries a woman divorced for adultery is an adulterer, whether he himself has been married before or not, and he must undergo the penance of an adulterer.

470. 4. Any priest who gives the benediction at the second marriage of parties divorced by mutual consent (which is a thing forbidden by the laws) shall be deprived of his office.

471. *Conc. Bituric.* (A. D. 1031), c. 16. They who send away their lawful wives, save for the cause of fornication, shall take no other wives while the former live; neither shall the wives take other husbands; but let the parties be reconciled.

472. *Conc. Rotomag.* (A. D. 1072), c. 18. If the wife of any man who has gone on a journey into foreign lands,

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[1] The four following decisions of Alexius are the present law of the Oriental (Orthodox) churches. The translation is taken from Smith's Christ. Antiq., p. 113, col. 1.

shall marry another before she have evidence of the death of the former, let her be excommunicated until she have made due satisfaction.

473. *Conc. Rhem.* (A. D. 1099) c. 12. No man who has left his lawful wife may marry another.

474. *Decretals of Gregory IX.* (A. D. 1230), IV. 1–19. A woman who is not certainly assured of the death of her husband, cannot marry again, though he may have been long absent, and she knows not what has become of him. [Clement III., A. D. 1187–1190.]

475. IV. 8, 1. Leprosy occurring in either party after a marriage does not dissolve the marriage nor the effect of marriage, and the healthy party must either treat the other with conjugal affection, or they must make a vow of continence, to last until one of the two shall die. [Alexander III., A. D. 1159–1181.

476. IV. 8, 2. Married persons are not to separate on account of leprosy occurring in either party; but they are reciprocally bound to pay the conjugal debt. [Idem.]

477. IV. 19, 2. A husband and wife are not to be separated from each other on account of any crime committed by either of them, with the exception of spiritual fornication (*i.e.* infidelity) only; and even then the bond of marriage remains, so that the innocent party cannot marry again. [Idem.]

478. IV. 19, 3. A man may not put away his wife, even on the ground of notorious consanguinity, otherwise than by the judgment of the Church. [Idem.]

479. IV. 19, 4. A woman who has been put away by her husband, and demands to be taken back, may be repelled if she has been notoriously guilty of fornication (during the separation) provided that her husband has been continent.

480. IV. 19, 5. Marriage is dissolved by the adultery of

the wife, but in such wise that neither party may marry again; and if the husband marry another woman, his second marriage is null, and the first marriage, with all its duties and obligations, is restored. [Idem.]

481. IV. 19, 6. If a woman of her own motion (*i.e.* without the judgment of the Church) forsake her husband who has fallen into heresy, she is compelled to return to him if he return to the faith; but if the separation took place by the judgment of the Church, she cannot be required to return to him. [Urban III., A. D. 1185–1187.]

482. IV. 19, 7. The bond of marriage is not dissolved by the lapse of one of the parties into heresy; but if one of two married unbelievers is converted to the faith and the other refuses to continue their cohabition, or is willing to continue it only with blasphemy or while tempting the other to mortal sin, the marriage is dissolved, and the convert may marry again. [Innocent III., A. D. 1198–1216.]

483. *Conc. Trid.* (A. D. 1563), Sess. xxiv, c. 3. If any man shall say that only the degrees of consanguinity and affinity which are expressed in Leviticus can prohibit a contract of marriage and dissolve it when contracted, and that the Church cannot dispense with some of them, and cannot ordain that other degrees shall be prohibitive and dirimant impediments, let him be anathema.

484. c. 4. If any man shall say that the Church hath not had power to establish dirimant impediments of marriage, or that she hath erred in establishing them, let him be anathema.

485. c. 5. If any man shall say that the bond of marriage can be dissolved on account of heresy or uncongeniality (*molestam cohabitationem*) or the wilful absence of husband or wife, let him be anathema.

486. c. 6. If any man shall say that an unconsummated marriage cannot be dissolved by a solemn profession of re-

ligion (*i.e.* a public vow of chastity) made by either party, let him be anathema.

487. c. 7. If any man shall say that the Church errs when she teaches as she has taught in accordance with evangelical and apostolic doctrine, that the bond of marriage cannot be dissolved on account of the adultery of either party; or when she teaches that neither of them, even an innocent party who has not given the cause of adultery, can contract another marriage while the other party lives; or when she teaches that the husband who puts away an adulterous wife and marries another, and also the wife who puts away an adulterous husband and marries another, is guilty of adultery, let him be anathema.

[The Latin text of the previous canon is as follows: —

Can. VII. Si quis dixerit, ecclesiam errare, quum docuit et docet juxta evangelicam et apostolicam doctrinam, propter adulterium alterius conjugum matrimonii vinculum non posse dissolvi; et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse altero conjuge vivente aliud matrimonium contrahere; moecharique eum, qui dimissa adultera aliam duxerit, et eam, quæ dimisso adultero alü nupserit: anathema sit.]

488. c. 8. If any man shall say that the church errs when she decrees that a separation of married persons from the bed of each other, that is to say, of their cohabition, for a time certain or uncertain, may take place for many causes, let him be anathema.

Scholia.

The exceedingly difficult work of summarizing the foregoing canons of the Dissolution of Marriage is not done to the writer's satisfaction in the following

scholia. They are, nevertheless, inserted with the hope that, imperfect as they are, they may be of some considerable service to the student.

1. We observe, at the outset, the entire absence of any distinction in the legislation of many ages between a separation of married persons from cohabitation with each other, and an absolute dissolution of their marriage allowing either or both of them to marry again. In our modern thought the right of divorce is confounded with the right to marry another person after divorce; but these two separate ideas were not at all united in the minds of Christians for many ages. On the contrary, whereas we assume that a just cause of divorce justifies the injured party in marrying again unless he is distinctly forbidden to marry, the church always understood that both the parties were forbidden to marry unless they were expressly permitted so to do. Any study of the legislation of the church on this subject will lead to utterly fallacious conclusions if this foundation fact is not kept clearly in mind; but since the canons were usually formulated in connection with particular cases, it is important, in every instance, to pay close attention to the phraseology of the canon.

2. In the canons we find that: —

a. Contrary to Hebrew and Roman law, the sexual sin of a married man is adultery, equally with that of a married woman, 408, 425, 426, 446;

b. But this was not clear to St. Basil, 429.

c. Idolatry is adultery, 409, 441;

d. And so are many other sins, 441.

e. To cohabit with an adulterer is adultery, 434.

f. It is adultery to take another man's betrothed wife, 433.

3. Divorce is permitted and justified by the following causes: —

a. By adultery *only*, 405, 411, 413, 414, 428, 429, 455, 456;

b. And even then not to the woman, 428, 429, 436;

c. Nor to the man, if he is equally guilty, 442.

d. By suspicion of adultery, 440;

e. By idolatry, 409, 441;

f. By infidelity, 477.

g. And by other sins, 441;

h. By conspiracy against a husband's life, leading to bloodshed, 460.

3. Divorce is not justified by the following causes (chiefly occurring after marriage): —

a. Not even by notorious consanguinity, otherwise than by the judgment of the church, 452, 478;

b. Nor by heresy, 481, 482 485;

c. Nor for ascetic reasons, 415, 422;

d. Nor by madness or possession, 438, 466;

e. Nor by sickness, 453, 466.

f. Not even by leprosy, 475, 476;

g. Though the healthy wife of a leper may marry another man if the leper consents, 464.

h. Not by mutilation which renders the man impotent, 466;

i. But Gregory II. allowed a man to divorce a woman whose sickness rendered her incapable of the conjugal function, 459.

k. Not by uncongeniality, 453, 485;

l. Nor by any crime except spiritual adultery (*i.e.*, heresy), 477;

m. Nor by joint consent of the parties, 470;

n. Unless in order that one of them may make a vow of chastity, 462;

o. And an unconsummated marriage being no marriage, according to Leo I. (whose ruling we have seen under *Precontract* to have been afterwards overruled), 449;

p. An unconsummated marriage is dissolved by a religious vow, 486.

4. We observe also that: —

a. Since a divorce for insufficient cause is null, 413, 427;

b. The marriage of the parties after such a divorce is forbidden, 428, 456, 470, 471, 473;

c. As adultery, 437, 457, 469;

d. Under penalty of excommunication, 419;

e. Which is to be perpetual, if there were no cause for the divorce, 417.

5. The marriage of divorced persons in general, without mention of cause: —

a. Is forbidden, 410, 413, 416, 428, 437, 451, 455, 470, 473;

b. Under penalty of excommunication or suspension, 416, 420.

c. No divorced woman ought to marry, 428, 436.

6. Marriage of either party after a divorce for just cause: —

a. Is strongly discountenanced, 423;

b. Forbidden to the wife, 427, 439;

c. Forbidden to both, 408, 440, 465;

d. Under penalty of excommunication, 418.

e. It is declared to be adultery, 406, 410, 411, 413, 439, 443, 444, 447, 487;

f. And it revives the former marriage, 480.

g. But the Greeks hold that the innocent party may marry, 467, 468, 469.

h. Whether a woman who marries a man divorced for his adultery is an adulteress, St. Basil does not decide, 428.

i. While the Council of Trent teaches that only an unconsummated marriage is dissolved by a vow of continence made by either party (485), earlier legislation permitted the marriage of the other after a consummated marriage, 462.

k. After divorce because of conspiracy of the wife against her husband's life, the attempt being attended by bloodshed, the husband might marry, 460.

l. Incestuous crime which raised the impediment of affinity between the parties dissolved the marriage *ipso facto*, and permitted the innocent party to marry again (this, be it observed, *in the West*); 305, 307, 308, 309, 310, 311, 312, 313, 314, 315, 320, 321, 322.

7. Of desertion: —

a. To marry without certainty of a husband's death is adultery, 430, 432, 458, 472, 474;

b. And if the husband returns and insists, the wife must return to him, 450.

c. Desertion of a husband is a sin, 431;

d. Which justifies his marrying another, 428, 461;

e. Though not in every case, 463.

f. The second wife may be dismissed if the first returns, 435, 458;

g. And she may marry, but would do better not to marry, 435, 458.

8. Of the reunion of the rightly divorced: —

a. To cohabit with an adulterous wife is impious adultery, 405, 429;

b. But if she repent and amend she may be taken back, 407.

c. A husband who takes back an adulterous wife is to do penance with her as an adulterer, 454.

d. A clergyman who does not put away an adulterous wife is to be deposed, 424;

e. He is to be perpetually excommunicate, 421.

9. The canon of the Council of Trent concerning the doctrine of the indissolubility of marriage (488), unequivocal as it seems, is nothing better than an adroit evasion. The astute jesuit Perrone (Tractatus de Matrimonio, p. 69) says concerning it: "The Tridentine canon was expressly directed against the Lutherans and Calvinists, *who accused the church of error*, but *not* against the Greeks and Orientals, who still hold that the bond of marriage can be dissolved by adultery." He cites as his authority Cardinal Pallavicini, who declares that the original language of the canon was deliberately changed in order to make precisely that distinction. The cardinal admits that the distinction is *molto sottile*, so subtle, indeed, that members of the council could see no difference between the first form of the canon and the form actually adopted. The only subtlety in the case seems to me to lie in the admission that there was a purpose of ambiguity. That purpose being admitted, the ambiguity itself is plain enough.

On its face the canon declares what the Church of Rome has taught and still professes to teach, namely, that marriage is indissoluble even for the cause of adultery; so that even the innocent party may not marry another while the guilty party lives. Therefore, on the face of it, the canon is doctrinal, and seems to be a flat contradiction of the contrary doctrine which is held and taught by the Orientals.

In *form*, however, the canon only condemns those who affirm that the church *has erred* in her teaching. It does *not* condemn those wh hold or teach the oriental doctrine, which is not, therefore, pronounced to be a heresy.

In fact, it is left to be explained to the orientals at some convenient time, that their doctrine has not been condemned, and that, when stated without qualification, their doctrine is perfectly true; since, if there were no law of the church qualifying the operation of the law of God, the orientals would be perfectly right. But since the Roman Church has prohibited the marriage of persons who have divorced adulterers, she *has not erred* in teaching that such persons cannot marry again. If she had taught otherwise, she would simply have declared that her own law was inoperative and void.

Whether or not such studied ambiguity is *molto sottile*, to mere Anglican veracity it is utterly repulsive and disgusting.

E. Anglican Reformation.

At the Reformation no change was made in the then existing law of the dissolution of marriage. The ecclesiastical courts had jurisdiction in all causes matrimonial; and the canon law continued to be in force in all particulars which had not been set aside by formal legislation. It followed that no divorce could be obtained for any cause whatever, except by an act of parliament, for the canon law did not recognize divorce, and hence the ecclesiastical courts could put an end to an existing marriage only upon proof that it had been

void from the beginning. Into the later legislation of the British Parliament we are not required to enter.

F. Law of the American Church.

The entire legislation of the American Church on the subject of marriage and divorce is contained in the following short canon.

Digest of the Canons, Title II. Canon 13.

Of Marriage and Divorce.

§ i. If any persons be joined together otherwise than as God's Word doth allow, their marriage is not lawful.

§ ii. No Minister, knowingly after due inquiry, shall solemnize the marriage of any person who has a divorced husband or wife still living, if such husband or wife has been put away for any cause arising after marriage; but this canon shall not be held to apply to the innocent party in a divorce for the cause of adultery, or to parties once divorced seeking to be united again.

§ iii. If any Minister of this Church shall have reasonable cause to doubt whether a person desirous of being admitted to Holy Baptism, or to Confirmation, or to the Holy Communion, has been married otherwise than as the Word of God and the discipline of this Church allow, such Minister, before receiving such person to these ordinances, shall refer the case to the Bishop for his godly judgment thereupon: *Provided, however*, that no Minister shall, in any case, refuse the Sacraments to a penitent person in imminent danger of death.

§ iv. Questions touching the facts of any case arising under Section ii. of this Canon shall be referred to the Bishop of the Diocese, or Missionary Jurisdiction in which the same

may occur; or, if there be no Bishop of such Diocese or Missionary Jurisdiction, then to some Bishop to be designated by the Standing Committee; and the Bishop to whom such questions have been so referred shall thereupon make inquiry in such manner as he shall deem expedient, and shall deliver his judgment in the premises.

§ v. This Canon, so far as it affixes penalties, does not apply to cases occurring before it takes effect, according to Canon 4, Title IV.

THE END.